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RECORD, CASE NO. 15387.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 1003.

FAMOUS SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED SEPTEMBER 9, 1893.

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a United States of America, western district of Arkansas.

Pleas and proceedings before Hon. I. C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, case of

UNITED STATES
vs.
FAMOUS SMITH. } Indictment for murder.

1 United States of America, western district of Arkansas. In the circuit court, February term, A. D. 1893.

UNITED STATES
vs.
FAMOUS SMITH. } Murder.

The grand jurors of the United States of America, duly selected, empaneled and sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Famous Smith, on the 1st day of August, A. D. 1883, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one James Gentry, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Famous Smith with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he the said Famous Smith in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off, to, against, and upon the said James Gentry, and that the said Famous Smith with the leaden bullet aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid by the said Famous Smith discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound him, the said James Gentry, in and upon the left side of the back of him the said James Gentry, giving to him the said James Gentry then and there with the leaden bullet aforesaid so as aforesaid discharged and shot out of the gun aforesaid by the said
2 Famous Smith in and upon the left side of the back of him the said James Gentry one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he the said James Gentry then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Famous Smith, him the said James Gentry, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, contrary to the form of statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Endorsed on back): No. 69. United States vs. Famous Smith. Murder. A true bill. S. H. Sherlock, foreman. Witnesses: Geo. Vann, Webber Falls, I. T.; Frank Vore, Webbers Falls, I. T.; Geo. Carter,

Fort Smith, Ark.; J. H. Vestal, Webbers Falls, I. T.; J. W. Rice, West Fork, Ark.; Irvin Vore, Webbers Falls, I. T.; J. E. McDaniels, Webbers Falls, I. T.; One Russell; Joe. Flynn, Ft. Smith, Ark.; Mort Miller, Ft. Smith, Ark.; R. E. Blackstone, Fannie Starr, T. A. Collins, Webbers Falls, I. T.; Millard Fillmore, Webbers Falls, I. T.; Wm. M. Fisher, near Webbers Falls; Geo. Fisher, near Webbers Falls, I. T.; Jno. Miller, near Webbers Falls, I. T.; Laura Mackey, Webbers Falls; Mrs. Emma Foreman, Webbers Falls, I. T.; Jno. Fields, Webbers Falls, I. T.; Dick Tittle, Webbers Falls, I. T.; Chas. Vann, Webbers Falls, I. T. Filed in open court Feby. 13, 1893. Stephen Wheeler, clerk, by I. M. Dodge, D. C.

2½ *Record entries.*

In the circuit court of the United States for the western district of Arkansas February term, 1893, Saturday morning, 8½ o'clock, Feb. 11, 1893.

Court met pursuant to adjournment. Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STASES *vs.* FAMOUS SMITH. } Indictment for murder No. 69.

On this day come the United States of America by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment, and puts himself upon the country.

TUESDAY, *Feb.* 14, 1893.

(Caption omitted.)

3 Ordered by the court that this cause be and the same is hereby continued to the next term of this court and set down for trial May 18, 1893.

MAY TERM, 1893, SATURDAY, *May* 6, 1893.

(Caption omitted.)

On this day comes the said defendant by his attorney and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

SATURDAY, *May* 13, 1893.

(Caption omitted.)

On this day come on to be heard the application heretofore filed for witnesses in this cause, and the court being fully advised in the premises doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Robt. Van, Mrs. Robt. Vann, Mrs. J. E. McDaniel, Ned Smith,

Louis Crapo, Edmond Fleetwood, J. S. Downer, Bob Lackey, Dick Scott, Wm. Drew, Wesley Speck, Bob Tinner, Timothy Fields, and Richard Croslin, in behalf of said defendant, to be paid by the United States, and that a subpœna be issued for them returnable May 18th, 1893.

WEDNESDAY, *May* 24, 1893.

(Caption omitted.)

On this day, on motion of the district attorney, it is ordered by the court that an attachment be issued for R. E. Blackstone, returnable forthwith, to show cause why he should not be punished for his contempt in failing to appear as a witness in this cause when duly summoned thereto.

4 SATURDAY, *May* 27, 1893.

(Caption omitted.)

On this day comes the said defendant, by his attorney, and files his amended application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Dr. W. W. Campbell, Tom Watts, and John Drew, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable forthwith.

MONDAY, *June 5th*, 1893.

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Wm. M. Cravens, esq., and Thos. H. Barnes, esq., and it appearing from the returns of the marshal of this district that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue
5 joined. Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge under the law, the following were selected for the trial of this cause, to wit: James Burkitt, Lewis Bolin, Wm. H. Clark, James Casey, Wm. C. Dixon, Martin East, John M. Hough, James W. Swearingen, Thos. M. Townsand, Jas. W. Wolverton, Ben Brent, Henry Triesch, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury, and bailiff in charge, until discharged by order of said court.

TUESDAY, *June 6th*, 1893.

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Wm. M. Cravens, esq., and Thos. H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court: James Burkitt, Lewis Bolin, Wm. H. Clark, James Casey, Wm. C. Dixon, Martin East, John M. Hough, Jas. W. Swearingen, This. M. Townsand, Jas. W. Wolverton, Ben Brent, Henry Triesch, who took their seats in
6 the jury box and after hear *hearing* the balance of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

WEDNESDAY, *June* 7, 1893.

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Wm. M. Cravens, esq., and Thos. H. Barnes, esq., and now come the jury heretofore empaneled for the trial of this cause: James Burkitt, Lewis Bolin, Wm. H. Clark, James Casey, Wm. C. Dixon, Martin East, John M. Hough, Jas. W. Swearingen, Thos. M. Townsand, Jas. W. Wolverton, Ben Brent, Henry Treisch, who took their seats in the jury box, and after hearing the balance of the argument of counsel and receiving the charge of the court, retired, in charge of the sworn bailiff aforesaid, to consider of their verdict.

THURSDAY, *June* 8, 1893.

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Wm. M. Cravens, esq., and Thos. H. Barnes, esq., and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: James Burkitt, Lewis Bolin, Wm. H. Clark, James Casey, Wm. C. Dixon, Martin East, John M. Hough, Jas. W. Swearingen, Thos. M. Townsand, Jas. W. Wolverton, Ben Brent, Henry Treisch, who
7 returned into court the following verdict, to wit:

"We, the jury, find the defendant guilty of murder as charged in the within indictment.

(Signed) "T. M. TOWNSEND,
"*Foreman.*"

Whereupon, by order of the court, the jury was discharged from the further consideration of the case, and the said defendant remanded to the custody of the marshal to await final sentence.

SATURDAY, *June* 17, 1893.

(Caption omitted.)

On this day come the said defendant by his attorney and files his motion to set aside the verdict of the jury and for a new trial in this cause.

SATURDAY, *August* 5, 1893.

(Caption omitted.)

On this day come on for final hearing the motion heretofore filed by the said defendant to set aside the verdict of guilty of murder heretofore returned against him by the jury and for a new trial in this cause, and the court being well and sufficiently advised in the premises, doth overrule said motion. To which said ruling of the court the defendant, by his counsel, at the time excepted.

(Caption omitted.)

On motion of James F. Read, esq., attorney for the western district of Arkansas, the said defendant, Famous Smith, was brought to the bar
8 of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause, on the 8th day of June, 1893, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said. Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered that the said Famous Smith be deemed, taken, and adjudged guilty of the crime of murder; and it is ordered by the court that the said marshal of the district aforesaid cause the said Famous Smith to be taken hence, and him, the said Famous Smith, safely and securely keep from the date hereof until Thursday the 28th day of September, A. D. 1893, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Famous Smith to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Thursday the said 28th day of September, in the year of our Lord one thousand eight hundred and ninety-three, cause the said Famous Smith to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

9 Whereupon the defendant was allowed until August 23rd, 1893, to file his bill of exceptions in this cause.

AUGUST TERM, 1893, WEDNESDAY, *Aug.* 23, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorneys, and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And the defendant also files his assignment of errors and petition for a writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

(Caption omitted.)

On this day come the clerk of this court and makes known that a writ of error, taking this case to the Supreme Court of the United States, has been issued by the said clerk in this cause.

It is, therefore, hereby ordered by the court, that execution of sentence, heretofore pronounced in this cause, be stayed pending the action of the Supreme Court.

(Caption omitted.)

Considering the gravity and importance of this case, and it appearing to the satisfaction of the court that because of the great length of the assignment of errors, of the extent to which it goes in setting out the charge, and of the fact that very much of it is but a fragmentary statement of the charge—much of it, as well as the motion for a new
10 trial, is a statement of the charge different from what it is when taken together—the court believes it is impossible for the Supreme Court to know what the charge of the court was unless the whole of it is put in the bill of exceptions, that it may be examined by the Supreme Court.

It is, therefore, hereby ordered that the clerk of this court put the whole of said charge in the bill of exceptions, that the Supreme Court may see the applicability of the charge to the evidence.

The clerk is ordered to put in the bill of exceptions the whole of the evidence offered and admitted in the case.

11 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
FAMOUS SMITH, DEFENDANT. } Murder.

Be it remembered that on the trial of the above-entitled cause the plaintiff, to maintain the issues on the part of the Government, introduced the following witnesses: George Vann, Frank Vore, George Carter, J. H. Vestal, J. W. Rice, Irvin Vore, J. A. McDaniels, Joe Flynn, W. Mort Miller, R. E. Blackstone, Millard Fillmore, Fannie Starr, who testified as follows:

12 GEORGE VANN, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. George Vann.
Q. Where do you reside, Mr. Vann?
A. Webbers Falls.
Q. Do you know Famous Smith?
A. Yes, sir.
Q. How long have you known him?
A. I have known him a long time.

Q. Where does he live?
A. He lives close to Webbers Falls; his home is close there.
Q. Is he an Indian?
A. Yes, sir; said to be.
Q. He lives there in the Canadian district, does he?
A. Yes, sir; in the Canadian district.
Q. Did you know James Gentry?
A. Yes, sir; as a person.
Q. You knew him?
A. Yes, sir.
Q. Do you remember the time the killing of Gentry took place?
A. Yes, sir.
Q. Where did you live at that time?
A. I lived close to Webbers Falls, about two miles and a half, something like that amount.
Q. What direction from Webbers Falls?
A. I believe it was northwest.
Q. Are you a citizen of that country?
A. Yes, sir; said to be.
Q. Are you connected with Famous Smith in any way?
A. I am his brother-in-law.
Q. Married his sister?
A. No, sir; he married my sister.
Q. Do you remember when it was that Gentry was killed?
13 A. Well, I believe it was about 10 years ago this spring, as well as I remember about it, or this summer.
Q. It was in 1883?
A. Yes, sir; as well as I remember.
Q. Where was he killed?
A. He was killed down there right south of where Famous lived.
Q. Did you own the place you lived on at that time?
A. Yes, sir.
Q. How far was your place from Famous Smith's place?
A. Well, I never did measure it, but I believe it was something over a quarter of a mile.
Q. What direction from Famous Smith's?
A. Well, I would call it north.
Q. North from Famous Smith's place?
A. Yes, sir.
Q. Then he lived a quarter of a mile south from you?
A. Yes, si'.
Q. What direction was Webbers Falls from where you lived?
A. It was, I believe, as well as I remember, southeast course from where I lived.
Q. You lived about two miles and a half from Webbers Falls at that time?
A. Yes, sir.
Q. Where was Blackstone's store?
A. It was right at the Falls.
Q. Then Smith lived rather between you and Webbers Falls?
A. Yes, sir.

Q. Was your place on the road?
A. Yes, sir.
Q. Your house?
A. Yes, sir; kind of onn the road.
Q. Was Smith's house on the road?
A. Yes, sir; on one road that lead' to Webbers Falls.
Q. You were on the same road, then?
A. Yes, sir; both on the same road.
14 Q. On the same road leading to Webbers Falls, he a quarter of a mile nearer to the Falls than you were?
A. Yes, sir.
Q. Who else lived in that neighborhood immediately around there or near that place?
A. My brother, Bill Vann, lived right close by, on the same old homestead place.
Q. How far from you?
A. Right close by, about 2 or 300 yards.
Q. You stated a moment ago that Webbers Falls was rather in a southeast direction from you?
A. Yes, sir; I believe, as well as I remember it, I would call it that way.
Q. Was there a man named Russel lived near there?
A. Russel was living on the same place.
Q. How far did he live from where this man Gentry was killed?
A. Not a great ways; close by.
Q. About how far?
A. Well, I suppose it might have been 100 or 200 yards, probably. I don't know just exactly, but that is it just as near as I can guess at it.
Q. He was a renter from Famous Smith, was he not?
A. Yes, sir.
Q. Where is Russel now?
A. I don't know.
Q. When did he leave that country?
A. I don't remember what time he left the country.
Q. Well, about how long after this killing took place?
A. I could not tell you just exactly how long it was.
Q. Was it within a year?
A. I could not tell you. It may have been; it may have been longer. I don't know.
Q. About how many years has he been gone from there?
A. He has been gone several years from there.
Q. You say you knew Gentry; had you seen Gentry that day?
A. Yes, sir.
15 Q. Where was he?
A. He came up home, up there where I lived, north of Famous Smith's there.
Q. Where was Gentry living at that time?
A. I don't know; I believe though he was living at Mr. Blackstone's.
Q. That was in Webbers Falls?
A. No, sir; Mr. Blackstone did not live in Webbers Falls. He had a place out from Webbers Falls apiece.

Q. What direction, and where?

A. It was kind of southwest course, I believe.

Q. How far from Famous Smith's?

A. That was, I believe, about two miles and a half below there, something about that amount. He didn't live on the same road Famous Smith lived on.

Q. The road rin right straight on down there. Was it on the other side of Webbers Falls, from where Smith lived?

A. It was out from Webbers Falls in the bottom.

Q. Gentry was living at Blackstone's at that time?

A. I believe so; that was my understanding about it. That is what I heard.

Q. What time in the day was it you saw him that day of the killing?

A. I don't remember just exactly what time it was. It was along during the day sometime. It may have been near about 12 I reckon; somewhere along there.

Q. About how long before the killing?

A. Well, it may have been an hour before the killing, probably, as well as I remember.

Q. What was he doing at your house?

A. He came up there to get a shirt, I believe. He had some washing done.

Q. He was having his washing done at your house?

A. Yes, sir.

Q. What day of the week was this?

A. I declare, I don't remember.

16 Q. How long did he stay at your house?

A. He didn't stay there but a short time, a little while.

Q. Did he get a shirt?

A. Yes, sir.

Q. What direction did he go when he left your house?

A. He went off down towards Famous's down there, on down the road, down that way.

Q. Had you seen Famous that morning?

A. No, sir; I believe not; I don't remember of seeing him that morning.

Q. How long after Gentry left your house, after the shooting, until you heard that he was shot?

A. Probably it may have been over an hour, something to that amount, as well as I remember about it. I didn't have any timepiece. I am just guessing at it.

Q. Was it before dinner?

A. I believe it was along about that time of day sometime.

Q. Did you hear the shooting?

A. Yes, sir; I heard several shots down the road.

Q. How many shots did you hear down the road?

A. Well, there may have been four or five shots, probably, in the direction of where this shooting is said to have taken place down there.

Q. Down in that direction?

A. Yes, sir; down that way.

Q. Well, who first gave you the information that Gentry had been killed?

A. There was a woman that was living with me there.

Q. What did you do when you heard of the killing?

A. I went down the road in the direction of where I heard the shooting.

Q. What did you find when you got down there?

A. I went on from this man Russel's house, and I found the body of the man, dead.

Q. Who was there at that time?

A. There were several there; I don't know that I could tell
17 who all was there. I believe there was a face or two I can remember of seeing there.

Q. Who were they?

A. I believe Mr. Croslin was one.

Q. What Mr. Crosslin?

A. Dick Crosslin.

Q. Who else?

A. I believe Mr. Drew was one.

Q. What Drew?

A. I think John and Bill both were there, as well as I remember. I have studied about it right smart, and it seems like they were there.

Q. Was old man Russel there?

A. I don't know whether he was or not.

Q. How does the road run after it leaves the old man Russel's going to Webbers Falls?

A. It rin right down; I would call it south.

Q. Does it run straight there?

A. Tolerable straight.

Q. How is the country there, level or rolling?

A. It is tolerable level.

Q. Woodland or prairie?

A. Woodland; it is open part of the way in the bottom; there is some farms along there.

Q. Could you see from where this man's body was found to old man Russel's house?

A. Yes, sir; I think so.

Q. Any one at old man Russel's house could see where the shooting took place if they had been looking, could they?

A. The weeds had grown up high along the fence; I don't know whether you could see the place or not.

Q. You said a moment ago you thought you could see.

A. You could see from the road down the road to about his house, I think.

Q. This was in August, was it not?

A. I believe it was in July or August, as well as I remember.

Q. In hot weather?

A. Yes, sir.

18 Q. Now, when you got down there where was this man lying?

A. He was lying on the porch at Russel's.

Q. On his back?

A. Yes, sir.
Q. How was he dressed?
A. I declare I can't describe his clothing that he had on.
Q. Did he have a coat on?
A. I don't think he had a coat on.
Q. In his shirt sleeves?
A. I believe he was in his shirt sleeves, as well as I remember about it.
Q. Did he have any wounds on him?
A. I only seen one I would call a wound.
Q. Where was that?
A. I believe in the side of his neck.
Q. Which side?
A. I think it was on his left side.
Q. Now, about where on the neck was it?
A. I don't know that I could put my finger just exactly to the place or not, but somewhere on the side of his neck.
Q. Did it go through?
A. If it went through I am no' able to tell. I only saw one wound; that is all I remember of seeing.
Q. Did you see any other shots?
A. No, sir; none that I remember of at all.
Q. Was he bloody?
A. Yes, sir; he was a little bloody.
Q. How did that wound look; what was the appearance of it, the size and so forth?
A. It looked like a pretty good-sized shot.
A. About what was the size of the hole?
A. I could not tell you; I don't reckon just exactly the size of the hole.
Q. Was it bloody around there?
A. I don't believe—I don't remember whether there was much blood or not; a little blood, I believe.
19 Q. What did you do when you got there; did you do anything to the body.
A. Well we were talking about it there, and was wondering some about burying him—someone, I believe, remarked something about burying him, and the question was argued, I believe, wondering if he had any money to bury him with, and I run my hand in his pocket to see and pulled out his purse and opened it right there in the presence of several of them, and he did not have but 25 cents in it.
Q. You pulled out his purse; did you pull out anything else?
A. Yes, sir.
Q. What was it?
A. It was a knife.
Q. What kind of a knife was it?
A. It was a pocketknife.
Q. What kind of a pocketknife?
A. It was a rough-handled pocketknife.
Q. You are pretty well acquainted with knives; give us some other description of it. How many blades did it have in it?
A. I believe the best I know of it, I think there was four blades in the knife.

Q. Do you know what kind of a knife it was, whether it was any particular brand or anything?
A. No, sir; I don't belive I noticed the brand.
Q. Four-bladed knife, bone handle, rough handle?
A. Yes, sir.
Q. Black or white?
A. Kind of brown, I would call it.
Q. How large was it?
A. Medium-size pocketknife.
Q. About what length of blade?
A. I believe one of them was something near three inches long.
Q. It was a larger knife than I now hold in my hand, was it not?
A. Yes, sir.
20 Q. Was the blade something like this, or different?
A. It was made on a different style from that. It was a larger knife than that.
Q. Did you find anything else in his pocket?
A. No, sir; I believe not.
Q. Was the knife open or shut when you found it?
A. It was shut.
Q. What pocket was that in?
A. I believe that it was in his right pocket, as well as I remember about it.
Q. Was it a good knife?
A. Yes, sir; pretty good knife.
Q. Old or new?
A. It looked like it had been used for a short time. It was nearly new, I expect; it looked that way.
Q. Did you find anything on his right hand or wrist?
A. His quirt was on his wrist.
Q. On the wrist of his right hand?
A. I believe it was his right hand, as well as I remember his hand. It was on one of them; I believe his right.
Q. Do you mean his hand was through that leather loop on the end of the quirt?
A. Yes, sir.
Q. What size quirt was it?
A. It was a small size quirt.
Q. Do you know who found his body first?
A. No, sir.
Q. Did you inquire?
A. No, sir; I don't believe I made any inquiry at all about it.
Q. This you say was about dinner time?
A. Something near about that time of day, I believe, as well as I remember about it.
Q. Did you eat dinner afterwards?
A. I don't know whether I had eaten dinner before or afterwards; I don't remember.
Q. How long did the body remain there at Russel's?
21 A. I am not able to tell you; I don't know; I didn't stay there no great while until I went off.

Q. Had they come to any conclusion as to what disposition they should make of the body?

A. No, sir; they hadn't when I left.

Q. You left several there?

A. Yes, sir.

Q. What became of Famous Smith after that?

A. He staid around about there awhile.

Q. Around about where?

A. Around in the neighborhood there, I believe.

Q. Scouting?

A. Yes, sir.

Q. How long did he stay on the scout?

A. Well, for some time, I suppose.

Q. For several years, did he not?

A. Yes, sir.

The COURT. About how many years, if you know?

Mr. CRAVENS (counsel for defendant). What you know; not what you suppose.

The DISTRICT ATTORNEY. How many years, if you know, was he on the scout?

A. About 10 years, I reckon, as near as I can tell about it.

Q. This killing took place in the Canadian district, Cherokee Nation, did it not?

A. Yes, sir.

Cross-examination by Mr. WILLIAM M. CRAVENS:

He has been on the scout 10 years?

A. Near about it.

Q. Where do you live now?

A. I live in the Canadian district.

22 Q. How far from Webbers Falls?

A. I suppose it is about three miles, as well as I can guess at it.

Q. Hasn't Famous Smith been at home there attending to his business for years and years?

A. Yes, sir; he has been around home there right smartly.

Q. How long was he gone after this killing before you saw him back there?

A. I don't remember just exactly how long it was.

Q. Only a few months, was it not?

A. I could not tell just exactly how long it was.

Q. It wasn't a very great while, was it? When did you say the killing took place?

A. I believe it was ten years ago this summer.

Q. In July or August, you say?

A. Yes, sir.

Q. That is, in the July or August next coming 10 years ago?

A. Yes, sir.

Q. Don't you know, Mr. Vann, that for 8 or 9 years he has been about home there?

A. Oh, he has been in that neighborhood for right smart of the time.

Q. Do you know of his having been here at Fort Smith?

A. I have heard of him coming down here.

Q. You never saw him in Fort Smith?
A. No, sir.
Q. You have seen him at Webbers Falls?
A. Yes, sir; I have been with him there; saw him around there.
Q. You have seen him at his own house?
A. Yes, sir.
Q. You have seen him at your house, haven't you?
A. Yes, sir.
Q. Often and often, have you not?
A. Yes, sir.
Q. And often at his own house. I will ask you if he was not running a gin there awhile; managing a gin himself?
A. Yes, sir; he was there a part of the time; a little while.
23 Q. I will ask you if he was not managing a gin for you and himself in partnership for awhile?
A. Yes, sir; he had the management of the gin.
Q. And you were his partner?
A. Yes, sir.
Q. And he was at the gin superintending or bossing it; that is right, is it not?
A. Yes, sir.
Q. Now, you say you saw Mr. Gentry an hour or two before you heard the shooting?
A. Yes, sir; as well as I remember about the time.
Q. At your house. What direction was the shooting from your house?
A. I would call it south.
Q. The shooting was south from your house?
A. Yes, sir.
Q. That was in the direction of Webbers Falls from your house, was it?
A. No, sir; it was kind of in the direction of Webbers—not on a direct course.
Q. What direction is Webbers Falls from your house?
A. I would call it kind of southeast.
Q. Webbers Falls is kind of southeast, and this was more south than southeast?
A. Yes, sir.
Q. How long had you known Gentry?
A. I hadn't known him a great while.
Q. Well, as much as for a year, or six months, or something like that?
A. It might have been; I could not tell just exactly; he came in there, and I kind of got acquainted with him; he staid there I don't remember just exactly how long.
Q. Was he an Indian or a white man?
A. He claimed to be an Indian.
The DISTRICT ATTORNEY. We object to that.
24 Mr. CRAVENS (of counsel for defendant). He said he was an Indian, did he?
A. Yes, sir.
Q. What kind of an Indian?
A. He claimed he was a Cherokee Indian.

Q. What was his complexion?

A. He looked like an Indian; he was kind of yellow, swarthy color, I might call it; kind of dark skin, as well as I remember his complexion.

Q. What kind of hair?

A. I believe he had dark hair.

Q. His complexion and hair looked like the complexion and hair of an Indian, did they?

A. Yes, sir.

Q. Famous Smith, the defendant, is a Cherokee Indian, is he not?

A. Yes, sir; said to be a Cherokee.

Q. He is recognized as a Cherokee citizen up there, is he not?

A. Yes, sir.

Q. Well, is he not a Cherokee?

A. Yes, sir; I guess he is.

Q. He has always been considered so there?

A. Yes, sir.

Q. Born and raised in the Cherokee country?

A. Yes, sir; born and raised in the Cherokee Nation.

Q. Now, you saw Gentry at your house that day about noon, or sometime that day?

A. Yes, sir; come in sometime that day, as well as I remember about it.

Q. Did he have anything to say about Famous Smith?

A. He said him and Famous was about to get into it down there, I believe; was about to have a fuss down there, I believe.

Q. Had a fuss—was that what he said?

A. Yes, sir; as well as I remember the words that was spoken he came in there and said that.

Q. He came to get clothing that he was having washed at your house?

A. Yes, sir.

Q. Your folks were doing his washing. When he went away what direction did he go in?

A. He went down the road towards Famous's.

Q. Went in the direction of Famous Smith's?

A. Yes, sir.

Q. Was he riding or walking?

A. Riding.

Q. What was he riding?

A. He was riding a bay or dark bay or brown—a dark bay horse I would call it.

Q. Who did the horse belong to?

A. I heard it belonged to Mr. Blackstone.

Q. Was it not understood to belong to Bob Blackstone?

A. Yes, sir; I believe it was.

Q. Did the horse have a name, and was it not called Dock?

A. I believe that was his name.

Q. Then it was a dark bay or brown horse, belonged to Bob Blackstone, as you understood it, and was called Dock?

A. Yes, sir.

Q. You saw Mr. Gentry after he was killed; you went up and took a knife out of his pocket?

A. Yes, sir.

Q. I will ask you if that knife was not what was called a cattle knife, and if it did not have the words "cattle knife" on one of the blades?

A. I don't remember about the brands of the knife; it had one keen long blade to it, and the other, I believe, was a shorter blade.

Q. You don't remember the letters. Were there letters on it?

A. I don't remember the letters.

Q. I don't ask you that; I ask you if there were letters on it?

A. Yes, sir; I expect there was.

Q. You don't remember what they were?

A. I don't remember what they were.

26 Q. You didn't make any examination to impress it on your mind?

A. No, sir.

Q. One of the blades you say was about three or four inches long?

A. About three inches long, I said.

Q. That was the longest blade, was it not?

A. Yes, sir.

Q. The other was a little shorter than that, and kind of rounding, you say?

A. Yes, sir; went off rounding; there was kind of a sharp point to it.

Q. What was the color of the handle of the knife.

A. I believe it was a dark brown handle.

Q. Horn handle knife, was it not.

A. It may have been bone.

Q. Some hard substance like horn or bone?

A. Yes, sir.

Q. Rough and dark?

A. Yes, sir.

Q. When did you next see Famous Smith; did you see him that evening?

A. I don't believe I did; I don't believe I saw him that evening.

Q. Did you see him the next morning?

A. No, sir; I believe no.

Q. I will ask you if when you first saw Famous Smith after that, if there wasn't some cuts in his left coat sleeve, or one of his coat sleeves?

A. It seems to me that I saw a cut they said he had on; I must have seen it at his house, that there was some cuts in his coat sleeve.

Q. When Mr. Gentry was at your house I will ask you if you remember whether he had on a vest or not?

A. He might have done so; I don't recollect just exactly; he may have had a vest on.

Q. I will ask you if you remember how it was when you saw him at Mr. Russel's porch; did he have a vest on or not?

A. Probably he may have had a vest on; I don't remember.

Q. What is your best impression about that; about the vest;

27 whether he had one on or not when you saw him at the porch? What is your best recollection about that?

A. He may have had on a vest.

Q. Do you remember what the color of his shirt was?

A. His shirt was a white shirt.

Q. Do you mean a white shirt, or was it a calico speckled shirt?

A. I mean it was a white shirt.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say that one year there you and Famous had a gin together. What year was that?

A. I believe it has been two years ago, as well as I remember about it.

Q. You say Famous attended to that; did he attend to it all the time, or just some of the time?

A. Some part of the time.

Q. He wasn't there all the time, was he?

A. No, sir; not all the time.

Q. Not, you say that Gentry claimed to be an Indian?

A. Yes, sir; Gentry claimed kin with the Vanns' and Drews'.

Q. Don't you know that he was not recognized up there as an Indian?

A. I do not believe he was.

Q. He was not recognized as an Indian.

Mr. BARNES (of counsel for defendant). He has not said that.

The DISTRICT ATTORNEY (to witness). Don't you know that he was not recognized as an Indian?

A. I said that I did not believe that he was.

Q. You were there?

A. Yes, sir.

28 Q. When was that that Gentry told you that he and Famous were about to get into a difficulty?

A. It was that day.

Q. What did he say about it?

A. He said him and Famous were about to get into it a little while ago, and he said it was in a settlement, I believe, about a settlement they were having.

Q. Tell all he said now; I want the whole conversation.

A. And he said Famous was trying to take his saddle away from him, and he said, "Before I will give it up I told him he would have to leave my carcass lying there."

Q. What else was said about it?

A. I believe that is all I remember.

Q. Who was he talking to then?

A. He was talking to me, then, out in the yard at home.

Q. He knew you were Famous's brother-in-law, did he not?

A. Yes, sir.

Q. And that was all he said about it?

A. Yes, sir; that is all he said about it, as well as I remember.

Q. That he and Famous were about to get into it over a settlement, and that Famous was trying to take his saddle away from him, and that before he did it he would have to leave his carcass there?

Mr. CRAVENS (of counsel for defendant). He told Famous before he would do it he would leave his carcass there.

The DISTRICT ATTORNEY. How was that? Did he say he told Famous that?

A. He told Famous that, as well as I remember about what was said.

Q. Did Gentry tell you where he was going when he left your house?

29 A. No, sir; I do not believe he did; he got on his horse and went down the road.

Q. Did he have any package with him?

A. I don't remember of seeing anything.

Q. Where was it you say you saw this cut at—that coat with the cuts in it?

A. I believe I saw it there at Famous's house.

Q. How long after this difficulty?

A. I could not tell you just exactly how long; it was some time.

Q. Well, about how long; if you can not tell you can give some where near it, a year or two or three years?

A. I don't remember how long it was I seen it there at his house after that time.

Q. Who showed it to you?

A. I either seen it at his house or it was on him; I don't remember which.

Q. What sleeve was it in?

A. I believe it was in his left sleeve, as well as I remember about it; somewheres along there.

Q. In his left sleeve?

A. Yes, sir.

Q. You don't know who showed it to you?

A. No, sir; I do not remember whether it was hanging up in his house or whether he had it on.

Q. Cut across that way?

A. Yes, sir.

Q. Down near the end?

A. Yes, sir.

The COURT. You were asked by the district attorney awhile ago if the defendant was not on the scout; and then you were asked by Mr. Cravens, of counsel for defendant, if he was not about there a good deal of the time, a most of the time. Now, tell us how much of the time he was away from his home, from his usual place of abode, in that ten years? What were his habits, whether he staid at home regularly, or whether he was dodging from one place to another when the officers were about, or what did he do? Your answers leave the matter in an indefinite shape. You lived there close to him, and you know whether he was usually at home, or how that was.

A. Sometimes I went there and he was not at home, and sometimes I went there and he would be at home. Sometimes he would stay there a little while, and then be off.

Q. Do you know where he went to?

A. No, sir.

Q. Did he ever tell you where he went?

A. No, sir; I think not.

Q. Did he ever tell you why he was keeping away from home, why he did not stay with his family regularly, like you did; you haven't been doing that, have you?

A. No, sir.

Q. Why didn't Smith stay with his family? I will ask you to state if he has not told you time and again that he was dodging the marshals, keeping out of the way, to keep from being arrested?

A. Well, I don't believe he ever told me; I don't think I ever asked him about it, but I just supposed that he was.

Q. Now, why do you suppose that; was he ever around there when officers were about?

A. I don't know, sir; I believe not.

Mr. CRAVENS (of counsel for defendant). We will show that he was.

The COURT. The witness can state what he knows about it. If you ever saw him around there when officers were around you can state that, moving around as a citizen generally, the way you or any other citizen would when the officers were around in that community.

A. Well, I have seen him there when they said officers were around; he would be there at home.

Q. Was he hid away, or was he out around like you would be?

A. He would be around the place, sometimes in the house there.

Q. Was it his habit to stay there, live there, during that ten
31 years, constantly, as any other citizen?

A. No, sir; I would say I believe not.

The DISTRICT ATTORNEY. From what you know of it you are satisfied he was on the scout during that time?

A. Yes, sir.

Mr. CRAVENS (of counsel for defendant). Satisfied from facts in his knowledge; a conjecture might satisfy him.

The COURT. If he states he was on the scout that is competent. He has a right to state he was on the scout and give his reasons for that. That is a fact of itself, like he might state the color of a horse or the absence or presence of anybody at a given place at a given time.

Mr. BARNES (of counsel for defendant). We don't object to that, but we object to his conclusion.

Mr. CRAVENS (to the witness). Did you ever see the defendant on the scout?

A. I have seen him in the neighborhood and around.

Q. Where in the neighborhood did you see him?

A. Around close to Web'ers Falls there.

Q. Were you not at the same place you saw him?

A. Yes, sir.

Q. Were you on the scout?

A. No, sir.

Q. That wouldn't make him on the scout any more than you, I presume?

A. Of course, I would see him around in the neighborhood there, passing around; he would come there sometimes at home; sometimes I would see him at his house.

Q. You would see him at your house and at Webbers Falls?

A. Yes, sir; I have seen him at the store at Webbers Falls.

Q. And you run a gin with him?

The DISTRICT ATTORNEY. Then he would be away from home,
32 would he?

A. Yes, sir; I have seen him away from home and at home.

Q. Didn't you know of his being away from home, and you did not know where he was?

A. Yes, sir.

Q. Wasn't that frequently the case?

A. That was, right smart of the time.

Recross-examination by Mr. W. M. CRAVENS:

Hasn't your wife been away from home, and you did not know where she was?

A. Yes, sir.

Q. Did you think she was on the scout?

A. No, sir.

Witness excused.

33 FRANK VORE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. JAMES F. READ, and testified as follows, to wit:

Question. What is your name?

Answer. Frank Vore.

Q. Where do you live?

A. Webbers Falls.

Q. What business are you in?

A. Not in any.

Q. Do you know Famous Smith?

A. Yes, sir.

Q. How long have you known Famous?

A. Were raised together; we are about the same age.

Q. Are you a Cherokee?

A. Yes, sir.

Q. Did you know Gentry?

A. Yes, sir; I knew him.

Q. Where did you know him?

A. At the Falls.

Q. Where were you living at the time that Gentry was killed?

A. I was living at the falls.

Q. What business were you in, then, at that time?

A. I was clerking for R. E. Blackstone.

Q. Do you know who killed Gentry?

A. Famous told me that he did.

Q. Where was it that he told you that?

A. I think it was in 1883.

Q. What time of the year about?

A. It was in warm weather; probably in August.

Q. You were working at Blackstone's store at the time?

A. Yes, sir.

Q. Now, tell the circumstances connected with it.

A. Famous Smith rode up there, and he had a brother clerking
34 there at the same place, and he rode up there and called for his brother——

Q. How did he ride up?

A. I don't remember how he rode up, whether fast or slow. I went out on the porch and told him his brother was busy, and he told me he wanted to see me, and called me off to one side, and he said he had to kill Jim Gentry awhile ago, and I asked how *how* it happened, and he said they were riding down the road; they had a settlemnt up at his place, and they road' off down the road, to get Mr. Blackstone to stand good for the amount Gentry was owing him. It seems that Gentry fell in his debt.

After they had got down the road apeice, three or four hundred yards, Gentry struck at him with a quirt, and he told him, God damn him, he had him away from the house and he would whip him; and he said he told him he didn't want any trouble with him; he wanted to go down to get Mr. Blackstone to settle the matter, and he said then Gentry run at him with a knife, and told him, damn him, he would kill him; and he said he drew his pistol and told Gentry if he came at him he would hurt him, and Gentry cursed him, and said he would not shoot his pistol; wasn't afraid of him; something of that amount, and he rushed at him, and he shot him.

Q. Did he tell you where he shot him?

A. No, sir.

Q. Did he tell you how often he shot him?

A. No, sir; if he did, I don't remember it.

Q. What else did he say?

A. That is about all; he rode off.

Q. Did he buy anything from you before he left there?

A. I don't know what it was if he bought anything.

Q. Did he not get some cartridges there?

A. I don't remember whether he did or not.

Q. Well, think about that? Did he send any word to his brother?

35 A. No, sir; he told me to tell his brother.

Q. Did he say where he was going?

A. No, sir; he didn't tell me where he was going.

Q. Did he tell you anything about his wife; send any word to his wife?

A. No, sir; that is about all he told me.

Q. Did he say Gentry cut him?

A. No, sir; he didn't say anything about it.

Q. Did he say anything about whether he had cut him or not?

A. No, sir.

Q. Did he show you the cut where he had cut him?

A. No, sir.

Q. Was he in his shirt sleeves or have his coat on?

A. I don't remember anything about that.

Q. Where did he say he and Gentry were going?

A. He said they had started to Mr. Blackstone's to get Mr. Blackstone to stand good for the amount that Gentry was owing him. Gentry was working for Mr. Blackstone at the time, at his farm, or about the place.

Q. How far did he say they had gone?

A. Three or four hundred yards, I guess.

Q. And he said that Gentry raised up with his quirt and struck at him?

A. He said he struck at him first.

Q. That is, with his quirt, Gentry did?

A. Yes, sir.

Q. And he told him what?

A. Told him to come on down; he did not want to have any trouble with him; to come on down and get Mr. Blackstone to stand good for the amount.

Q. What was it Gentry said when he struck at him?

A. He said God damn him; he had him there away from the house, and he would whip him.

36 Q. Did he say whether they were on horseback or on foot?

A. He said they were riding down the road.

Q. Did he hit him with the quart?

A. He didn't say; he said Gentry struck at him with the quirt.

Q. And then he drew his pistol?

A. He said when Gentry started at him with his knife he drew his pistol and told him to stop or he would hurt him, and Gentry cursed him and told him he was not afraid of a pistol, he wouldn't use it anyway.

Q. Then what?

A. That is about all until he shot him when he came at him the second time.

Q. Do you mean the second time with his knife, or the second time including the time when he came at him with his quirt?

A. The time when he came after him with his knife is when he shot him.

Q. He had come after him with his quirt?

A. Yes, sir.

Q. Then he run after him with his knife?

A. Yes, sir.

Q. Then he shot him?

A. Yes, sir.

Q. The first time that he ran at him with his knife he shot him?

A. That was the second time he ran at him.

Q. That was the first time that he came at him with his knife, was it not?

A. I don't know whether it was the first or second time.

Q. You say he said when Gentry started at him with the knife he pulled out his pistol, and told him if he didn't stop he would kill him, and he said Gentry kept coming on and he shot him?

A. Yes, sir.

Q. That is the way of it?

A. Yes, sir.

37 Q. He didn't tell you that he had come at him the second time with his knife, did he?

A. I don't know about the second time. He said when he came at him he told him to hold up, and Gentry told him that he was not afraid of his gun, that he would not shoot anyway.

Q. That he kept on coming?

A. Yes, sir.

Q. And he shot him?

A. Yes, sir.

Q. That is the way he told you?

A. Yes, sir; that is as as near as I can remember about it.

Cross-examination by Mr. W. M. CRAVENS:

Q. Did he not tell you that Gentry cut his coat sleeve with a knife?

A. No, sir; if he did I don't remember it.

Q. Didn't you see the coat sleeve with a gash in it?

A. I don't remember; he didn't stay there but a few minutes.

Q. Well, afterwards, at some other time, didn't you see it?

A. I don't remember about seeing it.

Q. How long did you know Gentry;

A. I don't exactly remember the time; it had been a year maybe.

Q. Where was he living at that time? In the Cherokee Nation, was it not?

A. Yes, sir.

Q. About Webbers Falls?

A. Yes, sir; he was on the Canadian River the first I heard of him, and saw him.

Q. You knew him only about a year?

A. Yes, sir; something like that; it may not have been so long; I don't remember exactly when I knew him.

Q. Had you seen Gentry that day?

38 A. If I had I don't remember it.

Q. What time of day was it when Famous came to the store where you were?

A. I think it was in the evening.

Q. In the afternoon?

A. Yes, sir.

Q. He told you where the difficulty had taken place, did he?

A. Yes, sir.

Q. If I understand you, Famous said that him and Gentry had a settlement; that Gentry had fallen in his debt and they were on their way from Famous Smith's house to Bob Blackstone's to get Blackstone to stand good for what Gentry owed Famous Smith?

A. Yes, sir.

Q. That is the way he stated it?

A. Yes, sir.

Q. And while on the way Gentry drew a quirt on him and said to him that he had got him away from home, from the house now, and he was going to whip him?

A. Yes, sir.

The DISTRICT ATTORNEY. Struck at him with the quirt.

Mr. CRAVENS (counsel for defendant). Drew a quirt and struck at him with it. He said he had got him away from the house and was going to whip him?

A. Yes, sir.

Q. How many times did he strike at him with his quirt?

A. He didn't say how many times.

Q. Whether once or more?

A. No, sir.

Q. And then he remonstrated with him—that is, he said, "Let's go on to Blackstone's and settle the business," or words to that effect?

A. Yes, sir.

Q. And Gentry said he was going to whip him?

A. He said Gentry cursed him then and told him he would kill him.

Q. And run at him with his knife?

A. That is the way he told me.

39 Q. And he told him to stop or he would shoot him, and he said he was not afraid of his gun, that he would not use it, and that he came on and that he shot him?

A. Yes, sir.

Q. He didn't say whether that occurred once or twice or more, or how many times?

A. No, sir; that is about all he told me.

Q. He did not go into the minute details of how many times he run at him, how many times he cut at him, or how many times he shot?

A. No, sir; he didn't say anything about that.

Q. Did you go up to the place where he said the difficulty took place?

A Yes, sir; I went up there afterwards.

Q. How long before you went there?

A. I don't know for certain; it may have been ann hour.

Q. You went the same afternoon?

A. Yes, sir.

Q. Who went with you?

A. Joe Lynch, as well as I remember.

Q. Did Crapo go with you?

A. No, sir; not at that time.

Q. When you went up did you find the body?

A. Yes, sir; the body was lying on the porch at Mr. Russel's.

Q. The body was on the porch when you got there?

A. Yes, sir.

Q. Was that where he was killed?

A. About 150 yards from where he was killed.

Q. Was the place pointed out to you where he was killed?

A. Yes, sir.

Q. That was about 150 yards from Russel's porch?

A. Yes, sir.

Q. Were you up at that place again next day?

A. I was up there the next morning.

Q. Who was with you next morning?

A. Ned Smith and Louis Crapo.

Q. What took place up there?

40 A. We went up there to search for the knife that Gentry had. He claimed that there was a knife in his pocket. I think it was his brother said there ought to be some search made for his knife—if he had been cutting at Famous there must be a knife in his pocket.

Q. That was what took you up there next morning?

A. Yes, sir.

Q. What did you find there?

A. I didn't find anything; Ned Smith found a knife, I guess.

Q. Tell us what you saw about it.

A. We looked there quite a while——

Q. What place did you look—near where the body lay?

A. Yes, sir; from where the body was up the road, the way that Famous and Gentry had rode, and there was some horse tracks the side of the road in the bushes—I guess the tracks commenced about 30 yards from where the body was—and we found the knife somewhere between where the body was and where the tracks first struck the road—that is, the tracks first left the road. Ned picked up the knife and called our attenton to it.

Q. How far was the knife from the road?

A. Not over two feet, I do not think.

Q. I do not know that I fully understand your statement. Was the place pointed out t' you where the body lay?

A. Yes, sir. You could see a little blood where the body lay?

Q. How far was the knife from that place?

A. It wasn't over fifteen steps, I would not think.

Q. In what direction?

A. Right up the road the way that Gentry and Famous——

Q. That would be right towards Famous Smith's house?

A. Yes, sir.

41 Q. Fifteen or twenty steps up the road toward Famous Smith's house, and a step or two from the road?

A. About two feet; somewheres between two and three feet from the road.

Q. Fifteen or twenty steps up the road towards Famous Smith's house? Now, were there horses' tracks along where you found the knife?

A. Yes, sir.

Q. When the knife was found, what were you doing, and what was Ned doing? Were you trailing the horse tracks, or what were you doing?

A. Well, I suppose so; I think that is what we were doing when Ned found the knife; I don't remember for exactly.

Q. Then the knife was found on the trail of the tracks made by the horse?

A. Yes, sir; that was where the horse had left the road and where it came into the road—like it had been running something that way.

Q. And this was a little after it left the road, and between that and where it came into the road?

A. Yes, sir.

Q. Which side of the road was it as you went north?

A. On the right-hand side.

Q. That would be on the side next to the river?

A. Yes; it is on this side of the river—the same side we are on now.

Q. Famous Smith lived up the river from where Russel lived?

A. Yes, sir.

Q. Ned Smith, you say, picked up the knife?

A. Yes, sir; I think it was Ned picked it up.

Q. What was the condition of the knife when it was picked up?

A. I don't remember.

Q. Was it open or shut?

A. I don't remember.

Q. Whenn he picked it up, was your attention called to it?

42 A. Yes, sir; my attention was called to it.

Q. What kind of a knife was it, as well as you can describe it?

A. I don't remember; I think it was a cattle knife, though, maybe.

Q. You think it was a cattle knife?

A. Yes, sir; I could not say for certain what kind of a knife it was. I heard them talking about it, though.

Q. You knew Gentry for something like a year; was he a white man or an Indian?

A. I could not say; he looked like an Indian to me.

Q. What did he claim to be?

A. He claimed to be an Indian.

Q. What kind of an Indian?

A. A Cherokee. I was clerk at the election there when he came into to vote, and the judge would not let him vote; I don't know whether it was because he had not been there six months or had not been admitted. I could not say for certain.

Redirect examination by the DISTRICT ATTORNEY:

Q. Are you any relation to Famous Smith?

A. No, sir; I am related to his wife.

Q. What relation are you to her?

A. First cousin.

Q. You did not see Ned Smith pick up this knife?

A. No, sir.

Q. Where were you when he picked it up?

A. I don't remember; I was along on that trail, though, sorter behind him.

Q. Who else was behind him?

A. Louis Crapo.

Q. What time in the day was that?

A. Early in the morning; right after breakfast, I think.

43 Q. What time was it you went down to old man Russel's?

A. I think it was an hour after Famous told me this fellow was killed.

Q. Who went with you?

A. Joe Lynch.

Q. Who else?

A. If there was any one else along I do not remember.

Q. Did Ned Smith go?

A. I don't think he did; I don't remember who went.

Q. Did you tell Ned Smith that his brother had killed a man? Was Ned Smith a brother of Famous Smith?

A. No, sir; Rocky Smith was.

Q. Did Rocky Smith go with you?

A. No, sir; he staid in the store.

Q. You told him, did you?

A. Yes, sir.

Q. Where did Ned Smith live?

A. He lived about there; 20 or 25 miles up on the river.

Q. Where did you get with him?

A. He was clerking at Blackstone's at the time.

Q. Ned Smith was clerking at Blackstone's at the time?

A. Yes, sir.

Q. You say you don't know whether he went down with you that evening or not?

A. He did not go that evening, I don't think. I think Joe Lynch must went.

Q. When you got down there who else did you find there?

A. I don't know; there was several persons there.

Q. Was George Vann there?

A. I don't remember; he may have been.

Q. Who else was there?

A. I don't remember; I believe Dick Grayson was there; I don't remember. George Vann may have been there.

44 Q. There were a good many of the neighbors there, were there not?

A. I believe there were several persons there; I don't remember who all was there.

Q. What did you go down there for?

A. I went to see about this man; I didn't know but what the hogs had eat him. Famous said he was laying beside the road. Famous Smith's brother asked me to go down.

Q. You had told Famous Smith's brother what Famous had told you?

A. Yes, sir.

Q. Before you left?

A. Yes, sir.

Q. When you got down there, how long did you stay there?

A. I didn't stay but a little while. The fellow was laying on the porch, and I went and looked at him, and then went to the place where he had laid on the ground, and then I went back to the Falls.

Q. Did you tell anybody down there what Famous Smith had told you?

A. Yes, sir.

Q. Who did you tell?

A. I told Rocky Smith and anybody that asked me. It was pretty well known in fifteen minutes, I guess.

Q. I mean down at old man Russel's?

A. There was no use to tell them about it; the man died before I got there.

Q. Did you tell them what Famous had told you, how the thing happened?

A. I don't remember about that; I might have.

Q. You went down to the place where he was killed?

A. Yes, sir.

Q. Did you look around there?

A. I looked at the place where the man was laying was about all; I seen that, and that is all I did see.

Q. You saw horse tracks, did you?

A. I never noticed for any horse tracks.

45 Q. Wasn't it natural for a man going to a place of that kind to look around to see what evidence he could see of a difficulty?

A. It might be, but I didn't do that that I could remember of. I was where the fellow was laying; I went and looked at him on the porch, and that is all.

Q. Did you look for a knife?

A. At that time I didn't.

Q. When was it that it was suggested you go back down there and look for a knife?

A. It was next morning or that evening; I could not say when it was.

Q. Who was it suggested that?

A. Rocky Smith.

Q. You say you think it was a cattle knife?

A. I think it was; that is what I heard him say. I could not say for certain.

Q. What kind of a knife is cattle knife? Describe it.

A. It has "cattle knife" on the blade.

Q. A long blade?

A. Tolerable long.

Q. Then a shorter blade?

A. Yes, sir; a three-bladed knife is what they call a cattle knife. It had "cattle knife" written on the blade, but I could not say it was that kind of a knife; I just heard so afterwards.

Q. Did Blackstone keep these knives for sale?

A. I think he did. He kept a general assortment of knives.

Q. Do you not know that he kept that kind of a knife?

A. I could not swear certainly; it has been a good while ago.

Q. What is your best impression about it?

A. I think he did.

Q. It was natural, was it not, finding a knife of that kind there to talk about it?

A. It might have been.

Q. Would not that be the natural consequence of a thing of that kind?

A. Yes, sir; I guess so.

46 Q. Rocky Smith was the one that suggested that you go back down there and look for the knife?

A. I think it was Rocky.

Q. He sent this man Ned Smith with you?

A. Ned and Louis Crapo and myself went.

Q. Was this in the brush where it was, or was there any brush there at all?

A. There was little bushes right close to the road.

Q. And there were tracks going out of the road in a northerly direction?

A. I seen tracks go out of the road like a horse would leave the road, and right close to the road is where these horse tracks were and was where Ned picked up the knife.

Q. How do you know where he picked it up?

A. He said he picked it up there.

Q. Was it in a clear, open place where he picked it up?

A. I could not say; there was a good many bushes around there, small bushes.

Q. About 2 feet from the road?

A. Yes, sir; about that.

Q. You don't know whether the knife was open or shut?

A. No, sir.

Q. What became of the knife?

A. I don't know that either.

Q. Who kept it?

A. Ned. He had it when we left there; I do not know what he done with it.

Q. Did he take it back with him?

A. I think he did.

Q. What time was it you all found the knife?

A. In the morning, right after breakfast.

Q. Now, you say Gentry claimed to be an Indian; was he recognized up there as an Indian?

A. Well, I don't know whether the law would recognize him, but the people in general, I think, recognized him as an Indian.

47 Q. Didn't they refuse to let him vote?

A. That is, the judge told him he didn't take him for an Indian, or he hadn't been there six months, or had not been admitted to citizenship, or something like that; I could not say for certain what he did tell him.

Q. Don't you know as a matter of *that* that he had not been admitted to citizenship?

A. I don't know; I supposed that he hadn't from that.

Q. Didn't Gentry tell you that he hadn't?

A. I do not know that he did. I didn't have much to do with Gentry; I saw him several times around there. I was not intimate with him at all.

Q. You know they would not let him vote?

A. Yes, sir.

Recross-examination by Mr. W. M. CRAVENS:

Q. You were clerk of the election, I believe?

A. Yes, sir.

Q. I understand you to say your impression was they did not let him vote because he had not been there six months. Didn't your law require then, and does it not require now, that a party shall be in the district six months to vote—that is, you have to be there six months before you are a resident of that district?

A. I don't know whether it was for that or whether he had not had his rights established; I could not say for certain about that.

Q. Louis Crapo went with you, and he was with you when the knife was found?

A. Yes, sir.

Q. He went up there with you and Ned Smith?

A. Yes, sir.

Q. What business are you engaged in up there; what are you
48 doing now?

A. I am not doing anything.

Q. Haven't you got a farm?

A. Yes, sir.

Q. What has been your business heretofore?

A. Merchandising—sort of a stock man. I have been buying cattle this spring. I merchandised three years and went out of the mercantile business last January.

Redirect examination by the DISTRICT ATTORNEY:

Q. How long had Gentry been around up there in that country when he was killed?

A. I don't know for certain how long he had been there.

Q. Well, about how long?

A. Well, I think he had been around there and over in the Choctaw Nation probably a year or longer.

Q. It takes six months' residence——

A. They have to be six months residence in the district before they are allowed to vote.

Witness excused.

49 GEORGE VANN was recalled by the Government, and upon being further examined by the district attorney, Mr. James F. Read, testified as follows, to wit:

Question. What did you do with that knife you took out of Jim Gentry's pocket?

A. I put it my trunk after I carried it around awhile.

Q. What became of it?

A. I don't know.

Q. Have you looked for it since?

A. Yes, sir.

Q. Were you able to find it?

A. No, sir.

Q. It was not where you put it?

A. No, sir.

Q. You said you thought it had some lettering on the blade.

A. I think it had letters on the blade; nearly all good knives generally do; but I do not remember the brand of the knife.

Q. Do you think it was a cattle knife?

A. I belive it was; yes, sir.

Q. How long had Gentry lived up there in that country?

A. I could not tell just exactly how long, because I did not keep any record of it.

Q. Well, about how long?

A. He may have been there several months.

Q. Well, might he not have been there a year or two?

A. I don't think he had been there a year or two. He might have been there something about a year, according to my rememberance of it.

Q. He had been working for Famous Smith considerable of the time, had he not?

A. Yes, sir; he worked for him.

Q. Did he not raise a crop for him?

A. I don't know whether he made any crop for him or not. I believe he had been logging.

50 Q. Been working for him considerable time. How long had it been since he left Famous Smith's employment and gone down to Blackstone's?

A. I don't remember just exactly how long; but I would suppose it was a short time.

Q. Where did Gentry come from to that country?

A. Well, I am not able to tell you.

Q. You don't know?

A. No, sir.

Q. He was not raised there?

A. No, sir; he was not raised around in my neighborhood there. I don't remember of his being raised in there.

Q. If he was raised there it was without your knowledge?
A. Yes, sir.
Witness excused.

51 GEORGE CARTER, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. George Carter.
Q. Where do you live?
A. I am living in Fort Smith at the present time.
Q. Did you ever know Famous Smith, the defendant?
A. Well, I have seen him some time ago.
Q. Were you ever acquainted with him personally?
A. Not to say personally acquainted with him.
Q. Did you know James Gentry?
A. I have seen him.
Q. Were you acquainted with him?
A. Not personally.
Q. Do you know where he came from?
A. No, sir.
Q. Where was it you saw Gentry the last time?
A. I saw him at the falls—Webbers Falls, in the Cherokee Nation.
Q. Was that after he had been killed?
A. I saw him before and afterwards too.
Q. Did you see him after he was killed?
A. Yes, sir.
Q. Where was he at that time?
A. At the Falls.
Q. At what place at the Falls?
A. He was in a wagon the fi'st time.
Q. What time in the day was it you saw him?
A. I could not say what time it was in the day.
Q. Who brought him there, do you know?
A. No, sir; I could not say for certain.
Q. Were you living at the falls at the time?
A. Yes, sir.

52 Q. What were you doing?
A. I was working in the shop.
Q. What kind of a shop?
A. A blacksmith shop.
Q. Are you a blacksmith by trade?
A. Yes, sir. Well, I am an engineer by trade, but I was working in the shop there; I have been working here as engineer for the Fort Smith Paving Brick Company.
Q. What was the condition of Gentry's body when he was brought to Webbers Falls?
A. He was carried down to a small little house that was being used for a barber shop and there dressed.
Q. Did you go in to look at it?
A. Yes, sir.

Q. What did you go in for?
A. I went in to dress it.
Q. Did you examine the wounds?
A. I saw the wounds; I did not particularly examine them.
Q. Was he undressed there?
A. Yes, sir; we undressed him there.
Q. Who assisted in undressing him?
A. I could not say who all did.
Q. Several in there?
A. Yes, sir; there was several in and around there.
Q. Did you assist?
A. Yes, sir.
Q. Where was he shot?
A. My best recollection is he was shot through the neck, and there was a wound in his arm here, and there was three along here in the back.
Q. Where was the shot in the neck?
A. Somewheres along here [indicating]. I did not take any particular notice of it.
Q. You point along on the left side of the neck?
A. Yes, sir.
Q. And in here?
A. Yes, sir.
Q. There was three along here?
53 A. Yes, sir; this shot seemed to have come from the arm; I don't know whether it went through the body or arm or not.
Q. Do you know whether these shots [indicating] went through or not?
A. No, sir; I do not recollect.
Q. Did you know Famous Smith at that time?
A. I knew him when I saw him. I was not personally acquainted with him.
Q. I understand you to say you had had no acquaintance with Gentry?
A. No personal acquaintance; I had saw him, and talked with him like I did other strangers in and out at the shop there.
Q. Are you related to either one of them?
A. No, sir; not that I know of.
Q. Do you know where Gentr' lived before he went there?
A. No, sir.
Q. You don't know anything about it, then; you were not interested in the matter one way or the other?
A. No, sir.

Cross-examination by Mr. THOMAS H. BARNES:

Q. Did the wound in his neck go though his neck?
A. I think it did.
Q. It was somewhere on the left side of the neck, but you can not be positive just where?
I can't tell; I think it went through. I did not make any close examination.
Q. Somewhere on the left side of the neck going through, but you do not know just how?

A. I do n't know just exactly how.
Q. It did n't go back?
Q. No, sir.
Q. It seemed to be rather from the side?
A. Yes, sir.
54 Q. Was it in front of this bone in the neck, or a little in front, in here?
A. It was further on the side, to the best of my recollection; it was along up and down here.
Q. It did not go through back here?
A. No, sir.
Q. It seemed to be a wound from the left side, did it not?
My best recollection is it did.
Q. Do you know whether it went into the left or right side?
A. I think it went to the left.
Q. I suppose, as a matter of fact, while you thought that, you can not be absolutely positive about that any more than you can within an inch or two where it struck, because that has been a long time ago? You could not be positive, but your best recollection is it went in front the left?
Q. Your best recollection is that these wounds on the body were up and down in a line like——
A. No, sir; no line; they seemed to be on no perpendicular line.
Q. Very nearly, though?
A. I could not say they were; they seemed to be right along in here; they were not scattered very much.
Q. Were any of these shots in the left shoulder;
A. I do not recollect of seeing any in the left shoulder; it was a little below the shoulder.
Q. These shots you do not think came out?
A. No, sir; I do not think they did; if they did I do not recollect it; saw no marks.
Q. One of these shots you saw there seemed to be a shot that had gone through the arm, did n't it? One of the marks on the body here?
A. One of the marks here seemed to be one that went from the arm; I could not say positively.
55 Q. Your best recollection is that the arm was hit where you put your finger?
A. It was along here between the elbow and shoulder. Of course I never noticed close where it was; it was between the elbow and shoulder; along here.
Q. I want to be fair with you, and you want to be fair with me, I suppose, but just a minute ago you put your finger here; and now when I asked you if your best recollection was that it was here, you say somewhere along between here and here?
A. It was somewhere between the elbow and shoulder.
Q. As a matter of fact it might have been here?
A. No, sir; not that high up, I think.
Q. It might have been here?
A. Somewhere between the elbow and shoulder.
Q. That shot wherever it was went into the body?

A. Yes, sir; I think it did; of course I don't know.
Q. There was another hole under the left shoulder blade, was there not?
A. There was three marks back there.
Q. Have you told all the marks that were on the body, as well as you recollect?
A. According to my best recollection.
Q. You think you saw three marks on the body?
A. I saw altogether five marks.
Q. On the body?
A. Yes, sir.
Q. On the man's trunk?
A. Yes, sir.
Q. This one in here would make four. This one here seemed to go through into the body.
A. I could not say whether that was the same shot or a different shot. There was three here besides this one here that seemed to go into the body.
Q. Did you see any shot here in front anywhere?
A. No, sir.
56 Q. Can you be any more definite in locating these shots here?
A. No, sir.
Q. How much did you handle the body there?
A. I could not tell you about that.
Q. Who else handled the body?
A. I could not tell you that; there was several there part of the time.
Q. Where were you staying at that time?
A. I was staying in the Falls.
Q. Who with?
A. A man named Parnell and I were living together in the same house.
Q. What were you doing.
A. I was employed in the blacksmith shop.
Q. Is Parnell a cirizen there?
A. No, sir; not supposed to be.
Q. How long had you been there?
A. I could not say how long I had been there.
Q. Who took the body out of the wagon?
A. I could not say who all; there was several around there; I assisted in taking it out myself; I could not say who else. I did not pay particular notice to it.
Q. Was that a small shop?
A. Well, at the time it was a small blacksmith shop.
Q. The shop he was taken into?
A. That was a barber shop; a small place; one room.
Q. About 6x8, or 8x10, was it not?
A. I could not say the size: it was not very large.
Q. How was the man's body lying in the room?
A. It was lying lengthways in the room.
Q. From the door back towards the river?
A. Yes, sir.
57 Q. His feet was towards the door?
A. His feet was from the river towards the door.
Q. Were his feet towards the door?

A. I think they we'e; I would not be positive about that.

Q. Any more than you will be positive about the exact location of these wounds. There is lots of things you can not be positive about in that connection, is there not?

A. I did not say positively——

Q. You can not be positive who helped take him out of the buggy?

A. I helped assist take him out.

Q. Who else?

A. I could not tell you who else.

Q. Who helped dress him?

A. I could not tell you that.

Q. You can't be positive about that?

A. I think probably Mr. Downing, I am not certain; and Mr. Bob Lackey, and probably more. My best recollection is they did; I would not be positive they did.

Witness excused.

58 J. H. VESTAL, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. James F. Read, and testified as follows, to wit:

Question. Where do you live now?

Answer. In the Canadian district, Cherokee Nation.

Q. Where did you live at the time that Gentry was killed?

A. I lived where I do now; that is, I have built a house since.

Q. How far from the killing?

A. About a mile.

Q. When was the first time you heard of the killing?

A. It was an hour or two—ma*b*ye two hours—after he was killed.

Q. What direction did you li*f*e from where he was killed?

A. Mighty near north.

Q. You lived further away from Webbers Falls than this killing took place?

A. Yes, sir; a little bit further.

Q. Did you hear any shots that day?

A. Yes, sir.

Q. How many?

A. Five.

Q. Did you hear any other shots that day besides these?

A. Not that I remember.

Q. Was that in the direction of the killing?

A. Yes, sir.

Q. How were they shot?

A. In rapid succession. There was three shots first, and then like one had snapped and then two more.

Q. Were they quick?

A. Yes, sir; tolerable quick.

Q. You knew Famous Smith, did you?

A. Yes, sir.

Q. How far was that place from where Famous Smith lived?

A. It was about a quarter, I guess; maybe a little further.

Q. Did you see Famous Smith after the killing?

A. No, sir; not for some time; I saw him frequently after he
59 came back. He went off some place, I don't know where.

Q. He was on the scout, was he not?

A. I think so.

Q. How long was he gone away from home?

A. I don't recollect.

Q. About how long?

A. I suppose he was gone a month, or two, or three—that is, before I saw him.

Q. You don't know where he was?

A. No, sir.

Q. When you saw him when he came back did he stay at home all the time?

A. No, sir; I don't think he did. He was first one place and then another. He would come to my house frequently, and go to other places.

Q. He was dodging deputy marshals all that time, was he not?

A. He was riding up and down the road and everywhere.

Q. He was dodging the marshals all that time, was he not?

A. Yes, sir; you might call it that.

The COURT. How long since the killing has he been dodging the marshals?

A. He has been at that kind of business, I reckon, ever since.

Q. Until he was arrested?

A. Yes, sir.

The DISTRICT ATTORNEY. That is what you say, is it?

A. Yes, sir.

Q. That he has been dodging them ever since the killing until he was arrested?

A. Yes, sir; when he would hear there was marshals coming into the country, he would go away some place else.

Q. Do you know how long Gentry had lived in that country when he was killed?

A. No, sir; I don't know. Some two, or three, or four months, I guess.

Q. Do you know where he came from to that country?

A. He told me that he had come from the Chickasaw Nation;
60 he had been driving teams for parties, and then he came up in there and drove for Smith.

Cross-examination by Mr. WM. M. CRAVENS:

Q. Was Gentry a white man or an Indian, or do you know?

A. I don't know; he told me he was an Indian.

Q. He claimed to be an Indian?

A. Yes, sir.

Q. What sort of an Indian?

A. He never told me that, that I know of. The presumption with me was that he was a Cherokee. He said he was going to vote.

Q. He was only there according to your information three or four months? I believe that is what you say?

A. I do not recollect of his being there more than that much; I don't know, though.

Q. How far did you live from Famous Smith?

A. About three quarters of a mile.

Q. Has there been any time in the last five years if you wanted to see him that you could not see him?

A. I could go to his house and he was frequently at my house. I could find him any place.

Q. Haven't you frequently seen him at Webbers Falls; seen him in town?

A. No, sir; I don't recollect of seeing him there; I don't go to the Falls much myself.

Q. You have been scouting around Webbers Falls yourself?

A. I have been afflicted with rheumatism, and so I could not do much scouting.

Q. Did you ever scout up to his gun when he was running his
61 gin there?

A. I have been about the gin a little.

Q. Wasn't Famous there then? Haven't you seen him there?

A. I think I have; I have seen him at his gin.

Q. I will ask you if for seven or eight years last past he has not been right around in the neighborhood there, attending to his business, as ordinary farmers would do?

A. Yes, sir; he would be a going around there doing one thing and another.

Q. Seeing after his farm and running his gin?

A. Yes, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. You are a Cherokee, are you not?

A. No, sir.

Q. You are a Cherokee citizen?

A. Yes, sir; I am a citizen, but not a Cherokee.

Q. Are you any relation to Famous?

A. No, sir; none.

Q. To his wife.

A. No, sir.

Q. Gentry told you that he was going to vote; did he vote?

A. I don't know; I heard not; I do not know of my own knowledge.

Q. Do you know whether he had been adopted as a citizen or not?

A. No, sir; I do not. If he was an Indian he would not have to be adopted.

Q. Do you know whether he was recognized there as a citizen by the people in that country?

A. No, sir; I do not.

Q. You say that Mr. Smith, the defendant, was around home there pretty constantly?

A. Yes, sir.

Q. He was not very familiar with deputy marshals, was he?

A. He had some of them employed—working for him.

62 Q. I understood you to say awhile ago that if he heard of a deputy marshal coming in the country he would get out of the way?

A. There were different sets of marshals, you know.

Q. What sets of marshals did he have employed?
A. I don't know their names.
Q. What sets was it that he would get out of the way of?
A. When he would hear there was a gang of marshals coming up maybe he would go around somewheres; sometimes he would come to my house, and sometimes he would go to somebody else's house.

Witness excused.

63 J. W. RICE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. J. W. is my initials.
Q. Where do you live?
A. I am living at West Fork.
Q. In this State?
A. Yes, sir; Washington County.
Q. How long have you been living there?
A. I went there last November was a year ago.
Q. What business are you in?
A. I am a miller by trade.
Q. Did you ever live in the Cherokee country?
A. Yes, sir.
Q. When was that?
A. It was some ten or eleven years ago when I went there.
Q. Where did you live at that time?
A. My first trip to the Territory I went to the Choctaw Nation out near McAlester, and from there I went into the Cherokee Nation near Webbers Falls.
Q. What were you doing at Webbers Falls?
A. I farmed there one season—that is, before I learned the milling trade, and I cut timber for the saw mill.
Q. Did you know Jim Gentry, who was killed up there?
A. Yes, sir; I heard of him.
Q. Do you know where he was from?
A. He said to me that he was from some part of this State, the southern part I believe.
Q. How long had he been there?
A. I could not say.
Q. How long had you known him there in the Territory before he was killed?
A. I got acquainted with him in the fall before was killed, as well as I remember; I am not sure.

Q. He was killed sometime during the summer of 1883, was he
64 not?

A. I think that is the time; sometime in the warm months of the year. I had known him the fall before.
Q. Where was he living at that time?
A. In the Cherokee Nation, I think. I am not sure whether it was the fall before or not. I could not be positive, but it seems to me that it was.

Q. Do you know where his family live?
A. No, sir.
Q. What age man was he?
A. I took him at that time to be about 25. He never did state to me his age.
Q. He looked like a man about 25 years of age?
A. Yes, sir; I would have took him to be that.
Q. Do you know whether he was a white man or an Indian?
A. I do not; he always claimed to be an Indian.
Q. Do you know whether he had been recognized up there or not?
A. No, sir; I do not.
Q. You don't know anything about that?
A. No, sir.
Q. Except he was raised in Arkansas?
Mr. CRAVENS (of counsel for defendant). The witness said Gentry told him that he came from there; not that he was raised there.
The DISTRICT ATTORNEY (to witness). What was it he said about that?
A. He said he had a stepmother living down in the southern part of Arkansas.
Q. Did he tell you where he had been raisel?
A. No, sir.
Q. Did he tell you where he had come from to that place?
A. He didn't tell me that he came from there to the Choctaw Nation, but that he had lived in the southern part of Arkansas, but he did not say where.
Q. That he had come up there from the Choctaw Nation?
A. Yes, sir.
65 Q. You don't know anything about his family of your own knowledge?
A. No, sir.
Q. Did you see him after he was killed?
A. No, sir.
Q. Did you hear the shots that day he was killed?
A. Yes, sir; I heard some shots in that direction.
Q. Where were you at that time?
A. I was working near the river, I suppose three-quarters of a mile probably from the place where I was told that the thing occurred.
Q. How many shots did you hear?
A. I think I heard 5; I am not positive however; four or five.
Q. How were they fired?
A. There was two shots close together, and then there was an interval between them and the other shots. It was frequent thing to hear shots there, and I never thought anything about it at the time.
Q. You say you don't know whether Gentry had ever established any rights in the nation or not?
A. No, sir; I do not.
Q. Did you know Famous Smith at that time?
A. Yes, sir.
Q. Do you know what his habit was with reference to carrying arms?

Mr. BARNES (of counsel for defendant). We submit that is not competent.

The DISTRICT ATTORNEY. Do you know what Gentry's habit was in that respect?

A. Gentry was very good habited, as far as I knew, about carrying arms. I never knew him to carry arms in my life.

The DISTRICT ATTORNEY. We will not insist on the other question, if the court please.

The COURT. What is your objection to it, Mr. Barnes?

66 Mr. BARNES (of counsel for defendant). I do not see how it would determine the issue one way or the other, as to whether he was in the right or not, or as to how this difficulty came up.

The COURT. It might be competent, but if the district attorney does not insist on it, that ends it. If he had not been in the habit of carrying arms, and armed himself on that occasion, showing he had prepared himself for a conflict, it might be competent.

The DISTRICT ATTORNEY. I will ask the witness to answer it now, whether he was in the habit of carrying arms?

A. I saw him frequently with arms.

Q. What kind of arms did he carry?

A. The ones I saw him on duty with was a six-shooter, what is called a Colt's Navy.

Q. About what size?

A. They usually carry 44's; I never examined the size.

Q. Was he an Indian policeman?

A. I say I don't know the size. I saw him guarding two colored men once.

Cross-examination by Mr. THOMAS H. BARNES:

Q. Do you know whether he had been a deputy sheriff?

A. I forget whether he had been a deputy sheriff or not.

Q. You say at the time of this occurrence he had been in the habit of carrying arms, and he was acting in some official capacity?

A. I saw him in no official capacity.

Q. Whether as policeman or deputy sheriff, or one or the other?

A. I don't know; I made no inquiry whatever. I suppose he was an officer.

67 Mr. CRAVENS (of counsel for defendant). And it was then you saw him armed?

A. Yes, sir; I saw him armed at these times.

Mr. BARNES (of counsel for defendant). You are not sure, but you thing you heard four or five shots?

A. Yes, sir.

Q. Three of them pretty rapid, and then a little interval, and you heard one or two more?

A. Yes, sir.

Q. This man Gentry, from the time you first knew him, claimed to be an Indian, did he?

A. I can tell the circumstances how I came to know that.

Q. I don't ask you to go into the particulars; it might not be competent, and I don't ask about that?

A. He told me in the presence of another party he was a Cherokee Indian.

Q. Did he tell you that when you first knew him in the Choctaw Nation?

A. Yes, sir.

Q. You are not sure whether that was one or two years before?

A. The best I remember, the length of time, it was the year before, in the fall before. I think that is when it was; the fall before that.

Q. You say you worked together at some mill down there?

A. Yes, sir; in the Choctaw Nation. I don't work at the mill there; I went there to where it was, and went to the river bottom to work in the timber.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say he made that remark in the presence of some witness; who was it?

A. Mr. Robinson, the man I went there to contract with.

68 Q. A Cherokee?

A. No, sir; he was a white man.

Q. Did you learn in that conversation whether his rights had been recognized or not?

A. No, sir.

The COURT. Where did he say he had been raised?

A. He told me that he had lived in southern part of Arkansas.

Q. Did he tell you that he was born and raised there?

A. He did not say that as I remember.

Q. Did he tell you where he was born and raised?

A. No, sir; he did not, to the best of my knowledge at the present.

The DISTRICT ATTORNEY. He told you his stepmother was living there?

A. Yes, sir; in the southern part of Arkansas.

Q. Do you know what other members of the family there were or whether there were any other members?

A. He told me that he had no relatives in that country at all.

Q. In what country?

A. Down in the southern part of Arkansas.

Witness excused.

69 IRVIN VORE, having been called upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Do you know Famous Smith?

Answer. Yes, sir.

Q. How long have you known him?

A. A good while; I could not tell the number of years.

Q. Where do you live?

A. Webbers Falls.

Q. How long have you lived there?

A. About a year after the peace.

Q. Since the last war, you mean?

A. Yes, sir.

Q. Are you a Cherokee?
A. Yes, sir.
Q. By birth?
A. Yes, sir.
Q. What business are you engaged in there?
A. Nothing right now.
Q. What were you engaged in at the time that Gentry was killed?
A. Policeman.
Q. An Indian policeman?
A. Yes, sir.
Q. Did you see Gentry after he was killed?
A. I rode in about 30 yards of him, I guess.
Q. Where was he?
A. Lying on the porch on one of Famous's places, renter's house.
Q. At old man Russel's?
A. Yes, sir.
Q. Do you know where old man Russel is now?
A. No, sir.
Q. How long has he been gone from that country?
I could not tell you.
Q. How long after this killing did he leave?
A. I don't know that; probably 2 or three years or something like that.
70 Q. You know that he left there?
A. Yes, sir; his boys got into trouble, and after his boys got into trouble he left.
Q. Do you know where he has gone?
A. No, sir.
Q. Did you see Smith about the time of the killing?
A. I saw him about an hour, may be two hours, after he had killed Gentry.
Q. Where did you see him?
A. He was at home—at my home.
Q. What was he doing there?
A. He came there to see me, I guess. He told me that he had killed Jim Gentry.
Q. What did he say about it?
A. I asked him how come him to do that, and he said he and Gentry were on this side of his house there, and he said Gentry commenced to cut at him—they got into a fuss, and he cut him two or three times on the arm, and he showed me his coat, and there was two or three places cut on his coat here.
Q. What arm?
A. The left arm. And he said Gentry had done that, and he said he was cutting at him, and he said he spurred his horse out of the way twice, and told Gentry if he didn't quit he would have to kill him, and he said Gentry would not stop, and he pulled his pistol out and killed him.
Q. How many times did he say he spurred his horse out of the way?
A. Twice, I believe is what he told me.
Q. Told him to stop twice?

A. Yes, sir; he said he told him twice. He said each time he would tell him, he would spur his horse out of the way.

Q. Gentry was coming at him with a knife all the time?

Yes, sir.

71 Q. Did he tell you that Gentry struck at him with a quirt?

A. No, sir; he never mentioned a quirt.

Q. And he told you that Gentry came at him twice with a knife, and was cutting at him, and he got out of his way twice, told him twice to stop, and then he drew his pistol and shot him?

A. Yes, sir.

Q. What kind of coat was that?

A. Coat something like this.

Q. It was in the summer time, was it not?

A. Yes, sir.

Q. Did he have on a vest?

A. I could not say whether he had on a vest or not.

Q. Was he armed at the time he was talking to you?

A. He was a policem'n himself then.

Q. He was armed?

A. Yes, sir.

Q. What did he have?

A. He had a pistol is all I seen; I do not know that I saw his pistol.

Q. Did he have it in his belt?

A. I could not say where he had it; I guess it was in his scabbard; I did not see it.

Q. Do you know what kind of a belt he had on?

A. No, sir; I do not; I could not describe the belt.

Q. Was it a cartridge belt?

A. Yes, sir.

Q. Was it a short coat or a long coat?

A. It was a short sack coat.

Q. He showed you on the arm there three cuts?

A. Yes, sir; two or three cuts.

Q. What did he say he was going to do?

A. He told me to go up there and tell his wife he would see her before he would leave the country.

Q. He told you that he was going to leave the country, did he not?

A. He just spoke it the way I said. He told me to go up to

72 the house and tell his wife that he would see her before he left the country.

Q. Did he not say this: "He told me that he was going to leave the country, and told me to go and tell his wife that he would see her before he left?"

A. I did not state it that way. He told me to go and see his wife and tell her he would see her before he left the country.

Q. Did you do that?

A. Yes, sir.

Q. Why didn't you arrest him?

A. I didn't think I had a right; and then, I never had my pistol.

Q. If you had had it you would have arrested him?

A. No, sir; I don't believe I would?

Q. Why?

A. I didn't think I had a right to arrest him. When they put me on the police force they told Famous and myself both to notice suspicious men and report them, and to spill whiskey, and such as that.

Q. Not to do anything else?

A. No, sir; they never gave any orders to arrest anybody.

Q. You were on the police force with Famous?

A. Yes, sir.

Q. Was he an officer?

A. Yes, sir; he was an Indian police.

Q. Do they act independently or are there companies?

A. They act independently. Of course they can be other officers at the same time. A sheriff can be an Indian policeman, and a policeman can be a marshal.

Q. You were an Indian policeman and so was he?

A. Yes, sir.

Q. Well, what did you do then?

A. I came on back home, after I told his wife what he said.

Q. Did you see the place where this killing took place?

A. Yes, sir; I rode right over the ground; that is, right along
73 in the road where they said it was.

Q. Did you get down to look?

A. No, sir; I did not get off of my horse.

Q. Why didn't you get down to look for a knife?

A. I did not know there was one there.

Q. You knew that he had cut at him—that he had been killed, evidently, with a knife in his hand?

A. That is what he told me.

Q. Did you tell his wife what he told you to tell her, or what he said about killing the man?

A. I don't remember what I told her.

Q. You didn't tell her whether you thought he was justified in doing it or not?

A. No, sir.

Q. You went along by the place of the killing about how long afterwards?

A. Probably an hour and a half—something like that.

Q. Did you see horse tracks there?

A. Yes, sir.

Q. You saw where the horse had moved out of the road, did you?

A. I saw where they had been running an' where he said they had commenced; I don't remember whether I noticed that or not. They might have kind of circled around—something that way.

Q. Did you see the blood?

A. No, sir; I never looked for any blood.

Q. You saw the body there?

A. Yes, sir; off about 30 yards.

Q. You didn't get down and go and look at it?

A. No, sir.

Q. Who was up there with you?

A. I went by myself.

Q. Was there anybody with the body at that time?

A. I don't know; it seems to me like there was one or two men standing around about the porch—something that way.

Q. Why didn't you go up?

A. I didn't care to see the body.

74 Q. Was there any knife you saw laying around there anywhere?

A. I didn't look for none.

Q. If there had been a knife in the road you would have been apt to see it, wouldn't you?

A. If I had put my eyes on it I would.

Q. You were looking at the plate where the man was killed, the place where the horse tracke were?

A. Not all the time; sometimes I was riding along and looking down, and sometimes looking off, just that way.

Q. Didn't pay much attention to it?

A. No, sir.

Q. You knew a man had been killed there?

A. Yes, sir.

Q. You didn't feel any interest in it?

A. No, sir.

Q. How long had Gentry lived in that country there?

A. I could not tell you that either, for I just don't remember about it.

Q. Did you know Gentry?

A. I seen him a few times. I never was right with him very much.

Q. What became of Famous Smith after this killing?

A. He staid there a while and then went off.

Q. When he told you to go and tell his wife he would see her, did he go off then?

A. He went off for some time, I don't know when it was, though.

Q. How long did he stay away?

A. He went off and came back, and then staid around awhile and then went off again.

Q. Where did he go when he went off?

A. He went to Texas, I think, the first time.

Q. How long was he gone?

A. I don't know that; probably a week, maybe longer.

75 Q. When he came back how long did he stay?

A. I don't remember that.

Q. When he went off the second time where did he go?

A. He went to California at one time; I don't know whether that was the second time he went off or not.

Q. How long did he stay away?

A. I could not tell you that, for I just don't know.

Q. About how long?

A. It may have been a year, and it may have been longer.

Q. Was he on the scout?

A. Yes, sir.

Q. For how long?

A. Ever since he killed that man, I guess. There was a few times about the Falls he didn't scout any; when they h'ard that the writ was called in I would see him going into town or to a picnic, or something that way.

Q. When the writ was called in?
A. Yes, sir.
Q. But when the writ was out he was out?
A. Yes, sir.

Cross examination by Mr. WM. M. CRAVENS:

Q. How far did you live from Famous Smith's?
A. Probably about 2 miles and a half, I believe.
Q. Have you been at his house lately?
A. No, sir.
Q. I mean before he was arrested?
A. No, sir; not lately I have not.
Q. How long had you seen him before he was arrested?
A. I could not tell that; I had seen him off and on all the time.
Q. You could see him whenever you wanted to, couldn't you?
A. I guess I could by going and hunting him up.
76 Q. You saw him sometimes at picnics and at Webbers Falls?
A. Yes, sir; I would see him at picnics and at Webbers Falls.
Q. Did you ever meet anywhere except at picnics and Webbers Falls?
A. Hardly ever; I don't visit much.
Q. You stay at home?
A. Yes, sir.
Q. I will ask you if you have not seen Famous at your house?
A. He used to come there a good deal before ma died.
Q. How long has your mother been dead?
A. About 2 years.
Q. I will ask you if he wasn't there frequently, almost weekly, at your house, before your mother's death; your mot'er lived with you, I believe?
A. Yes, sir.
Q. Was not Famous there almost every week?
A. Pretty near al' the time, I believe; sometimes he might skip a week or two, and then be three *three* or four times at a time. I would always see him in town or at picnics. I staid in town nearly all the time at the store.
Q. Do you know of his coming to Fort Smith?
A. He has been here in town, so I have been told.
The DISTRICT ATTORNEY. You do not know that of your own knowledge?
A. No, sir.
Mr. CRAVENS (of counsel for defendant). You didn't go with him?
A. No, sir; he was at a picnic just before he was arrested.
Q. Do you know whether he was a subscriber to the Elevator or not?
A. No, sir; I do not.
Q. Did you ever see him with Mr. Bud Weldon, editor of the Elevator, at Webbers Falls?
A. I don't know whether I ever did or not. Weldon was up there, and Famous was there; probably Famous might have met him.
77 Q. You never saw Famous in the woods up there, did you, since this killing, unless you went hunting with him, or something of that kind?
A. I saw him in the woods once; I don't know that he was scouting at that time; there was a few fellows drunk, and he was in the crowd.

Q. When was that?

A. That might have been a year or two after the killing, and it may have been two or three years after the killing.

Q. Has he not been carrying on his farming business, and his stock business—attending to his business generally as farmers and stock raisers in that country—for the last 5 or 6 years, or 6 or 7 years?

A. Yes, sir; since he came back from California, I believe. Every once in a while he would ride around for a week or two.

Q. Don't you ride around, too, sometimes?

A. Yes, sir; and then he would come back home and stay.

Q. He has got stock, has he not—cattle and horses?

A. Yes, sir.

Q. When was it that he came back there from California?

A. I could not tell you that.

Q. Well, about how long?

A. I expect it has been four or five years.

Q. Was it not a year or two after the killing th't he came back from California?

A. I could not say; I don't know.

Q. It has been 10 years next August since the killing; I will ask you if the trip to California was not within two years from the time that Gentry was killed?

A. I could not answer that correctly.

Q. You could not answer that?

A. No, sir.

Q. Since he come back he has been around up there just as any other farmer and stock raiser and citizen?

78

A. No' exactly; he was there nearly all the time.

Q. Going wherever he pleased, Have you got a citizen up there who is a stock raiser, who is at home all the time?

A. No, sir.

Q. Blackstone goes away from home?

A. Yes, sir; a great deal of the time.

Q. And Frank Vore?

A. Yes, sir; nearly all the time.

Q. You would not say they scouted because they went away from home sometimes?

A. No, sir.

Q. You and Frank are brothers, are you not?

A. Yes, sir.

Q. How old is Famous Smith?

A. I don't know, sir.

Q. What is your age?

A. 35 years old.

Q. Which is the oldest, you or Famous, do you know?

A. No, sir; I don't know; I suppose Famous is a little the oldest.

Q. You were about 25 when this killing took place?

A. If it was 10 years ago I was 25.

Q. You knew Gentry?

A. I was slightly acquainted with him; I wasn't in his company any hardly; I don't remember of ever being with Gentry. I have met him.

Q. You were with Gentry some?

A. Yes, sir; I would meet him, probably, and I would see him in town; I never would walk up and talk with him.

Q. Was he a white man or an Indian?

A. He claimed to be an Indian, is all I know about it.

Q. I will ask you if he did not look like an Indian?

A. I have forgotten how he did look. You see, I was not very well acquainted with Gentry. I had seen him, but I never was in his
79 company to amount to anything. I don't remember of ever being in his company. I have spoken to him, probably, but that is all.

Redirect examination:

Question. What relation are you to Famous?

A. None.

Q. To his wife?

A. First cousin.

Q. You say Gentry claimed to be an Indian?

A. Yes, sir; I only heard that; he never did tell me that.

Q. Do you know whether he was recognized as an Indian by the authorities or not?

A. They did not let him vote at one time—that is, I heard they didn't. I wasn't at the election.

Q. Don't you know that the authorities up there did not recognize him as an Indian?

A. I only heard they did not.

Q. You know when a man is scouting, do you not?

A. Yes, sir.

Q. And you say Famous has been scouting ever since he killed Gentry until he was arrested?

A. Yes, sir; he was scouting; there is awhile he did not scout.

Q. That is when he heard that the writ was called in?

A. Yes, sir; but he would always go where he wanted to.

Q. There 're a good many men do that and still dodge marshals, do they not?

A. Yes, sir; he would mix up with a lot of these deputy marshals.

Mr. CRAVENS (of counsel for defense). He would run around with them, would he?

A. Yes, sir.

The DISTRICT ATTORNEY. There are a good many different kind of deputy marshals, are there not?

A. Yes, sir.

Q. Don't you know that whenever he heard of a marshal up
80 there that was likely to have a writ against him that he would get out of the way?

A. Yes, sir.

Mr. CRAVENS (of counself for defendant). You never saw him get out of the way?

A. I never saw him.

The DISTRICT ATTORNEY. Have n't you talked to him about it?

A. I never talked to him but mighty little. He would always be at home——

Q. When you would see him? Did he ever come to your home when he dodged the marshals, when they had gone to his house?

A. I do n't know.

Q. Did he ever tell you he was scot'ing the deputy marshals, did n't want to see them?

A. Yes, sir; he told me that once.

Mr. BARNES (of counsel for defendant). How long ago was that?

A. I could not tell you how long ago it was.

The COURT. What did he tell you?

A. It was the time that Dick Vann and Cunningham were scouting, and he said the marshals were after him and Dick Vann, and that they run out of the house, and he said he heard them as they were passing up going up that way looking for them.

Mr. CRAVENS (of counsel for defendant). He saw the marshals passing by?

A. He said he heard them.

Witness excused.

81 J. A. MCDANIELS, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. James F. Read, and testified as follows, to wit:

Question. What is your name?

Answer. McDaniels.

Q. Where do you live?

A. I live at Webbers Falls.

Q. Are you an Indian?

A. Well, I guess I am.

Q. You are a citizen up there?

A. Yes, sir.

Q. How long have you lived there?

A. Well, about 11 years.

Q. Where did you go from to Webbers Falls?

A. I came from East Tennessee.

Q. Did you marry an Indian up there in the Territory?

A. No, sir.

Mr. CRAVENS (of counsel for defendant). You came from Arkansas, right out here in this county, didn't you?

A. I lived here a while, I know.

The DISTRICT ATTORNEY. Are you an Indian by blood?

A. The record says so; I don't know.

Q. Are you any akin to Famous Smith?

A. None at all.

Q. Did you know Gentry?

A. Well, yes; Gentry boarded with me 2 or 3 months. He was working there at that time.

Q. Who was he working for?

A. He was working for Mr. Smith.

Q. Where did Gentry come from to that country, do you know?

A. I don't know sir.

Q. Did you ever have any conversation with Famous Smith, the defendant, about this killing, after it took place?

82 A. Well, I have talked to him several times about it.

Q. What did he tell you about it; what was the first conversation, and when?

A. I do n't remember now the first conversation. Mr. Smith told me some two or three different times——

Q. What did he tell you the first time that he told you?

A. He said that he killed Gentry, and he done something that he didn't want to do.

Q. What did he say Gentry was doing when he killed him?

A. Gentry said he was going to whip him is what he told me.

Q. To refresh your memory I will ask you if you did not make a statement of this matter to Mr. Mellette when he was assistant district attorney?

A. Yes, sir.

Q. He took it down in writing?

A. I guess he did.

Q. To refresh your memory I will ask you if he did not say that Gentry was trying to hit him with a quirt when he shot him?

A. Yes, sir.

Q. He told you that Gentry was trying to hit him with a quirt, and threatened to whip him *with* he shot him?

A. Yes, sir.

Q. And that he tried to get him to quit?

A. Yes, sir.

Q. Did he ever say anything to you about Gentry having a knife and trying to cut him?

A. No, sir.

Cross-examination by Mr. WM. M. CRAVENS:

Q. When was it that he told you this?

A. I don't recollect.

Q. Ten or eleven years ago, was it not?

A. No, sir.

83 Q. Did he not mention a quirt and a knife both in the conversation with you?

A. Well, now, I don't recollect whether he did or not.

Q. It has been a long time, and you do not recollect fully all he said?

A. Yes, sir; it has been ten years ago.

Redirect-examination by the DISTRICT ATTORNEY:

Q. Didn't you state "He never said anything about Gentry having a knife;" didn't you tell Mr. Mellette that?

A. Not that I recollect of.

Q. Didn't you just say awhile ago that he never said anything about Gentry having a knife?

A. I didn't say anything about his having a knife——

Q. Did Smith ever say anything to you of Gentry having a knife when the killing occurred?

A. No, sir.

Recross-examination by Mr. WM. M. CRAVENS:

Q. Do you remember distinctly what he said to you, and what words Famous used to you; do you remember them ten years?

A. Well, no; not all of them; I could not give them all.

Q. How old are you?
A. I will soon be 60.
Q. Might it not be possible that he mentioned both quirt and
84 knife in that conversation with you, and that you have forgotten the knife?
A. If he did I do not recollect it.
Q. That is all you can say about it: if he did you do not recollect it?
A. Yes, sir.
Q. You might in ten years forget a thing like that?
A. I remember Mr. Gentry when he left my house and went to Mr. Smith's that day——
Q. Did he make any threats against him that way?
A. He just said he was going to have a settlement out of Smith.
Q. What else did he say?
A. And that is about all; we were all at the table.
Q. Had you heard him before that time make any threats against Smith?
A. No, sir; I didn't.
The COURT. Was there an account between them as you understood it?
A. Yes, sir.
Q. He claimed that Smith owed him?
A. Yes, sir.
Mr. CRAVENS (of counsel for defendant). Did you see Smith at all that day?
A. I saw him twice that day—that evening.
Q. Where were you?
A. I was in the field; he passed the road and I was in the field.
Q. Where is that field? Between Famous's house and Webbers Falls?
A. No, sir. It was the McDaniel farm.
Q. Above or below the Falls?
A. It is right in the Falls.
Q. The town is right on the bank of the river, is it not?
A. It is on a portion of the place. When I saw Famous he was going out of town.
Q. Going away from town?
A. Yes, sir.
Witness excused.

Here court adjourned until Tuesday morning, June 6th, 1893.

85 TUESDAY MORNING, *June 6th*, 1893—9:20 *o'clock*.

JOE FLYNN, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. Joe Flynn.
Q. Where do you reside?
A. I live about three miles from Fort Smith, between here and Van Buren.
Q. How long have you lived here?
A. I have lived here off and on for about 15 years.
Q. Did you ever live at Webbers Falls?

82 A. Well, I have talked to him several times about it.

Q. What did he tell you about it; what was the first conversation, and when?

A. I don't remember now the first conversation. Mr. Smith told me some two or three different times——

Q. What did he tell you the first time that he told you?

A. He said that he killed Gentry, and he done something that he didn't want to do.

Q. What did he say Gentry was doing when he killed him?

A. Gentry said he was going to whip him is what he told me.

Q. To refresh your memory I will ask you if you did not make a statement of this matter to Mr. Mellette when he was assistant district attorney?

A. Yes, sir.

Q. He took it down in writing?

A. I guess he did.

Q. To refresh your memory I will ask you if he did not say that Gentry was trying to hit him with a quirt when he shot him?

A. Yes, sir.

Q. He told you that Gentry was trying to hit him with a quirt, and threatened to whip him *with* he shot him?

A. Yes, sir.

Q. And that he tried to get him to quit?

A. Yes, sir.

Q. Did he ever say anything to you about Gentry having a knife and trying to cut him?

A. No, sir.

Cross-examination by Mr. Wm. M. Cravens:

Q. When was it that he told you this?

A. I don't recollect.

Q. Ten or eleven years ago, was it not?

A. No, sir.

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A. Well, now, I don't recollect whether he did or not.

Q. It has been a long time, and you do not recollect fully all he said?

A. Yes, sir; it has been ten years ago.

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Q. Didn't you state "He never said anything about Gentry having a knife;" didn't you tell Mr. Mellette that?

A. Not that I recollect of.

Q. Didn't you just say awhile ago that he never said anything about Gentry having a knife?

A. I didn't say anything about his having a knife——

Q. Did Smith ever say anything to you of Gentry having a knife when the killing occurred?

A. No, sir.

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Q. That is all you can say about it: if he did you do not recollect it?
A. Yes, sir.
Q. You might in ten years forget a thing like that?
A. I remember Mr. Gentry when he left my house and went to Mr. Smith's that day——
Q. Did he make any threats against him that way?
A. He just said he was going to have a settlement out of Smith.
Q. What else did he say?
A. And that is about all; we were all at the table.
Q. Had you heard him before that time make any threats against Smith?
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The COURT. Was there an account between them as you understood it?
A. Yes, sir.
Q. He claimed that Smith owed him?
A. Yes, sir.
Mr. CRAVENS (of counsel for defendant). Did you see Smith at all that day?
A. I saw him twice that day—that evening.
Q. Where were you?
A. I was in the field; he passed the road and I was in the field.
Q. Where is that field? Between Famous's house and Webbers Falls?
A. No, sir. It was the McDaniel farm.
Q. Above or below the Falls?
A. It is right in the Falls.
Q. The town is right on the bank of the river, is it not?
A. It is on a portion of the place. When I saw Famous he was going *p*ut of town.
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Answer. Joe Flynn.
Q. Where do you reside?
A. I live about three miles from Fort Smith, between here and Van Buren.
Q. How long have you lived here?
A. I have lived here off and on for about 15 years.
Q. Did you ever live at Webbers Falls?

A. Yes, sir; I have lived there. I staid there—well, I never liv d there long.

Q. Did you ever know a man up there named Jim Gentry?

A. I have heard of him; I never was acquainted with him.

Q. Do you know Famous Smith?

A. Well, no; I never was acquainted with him either. I have heard of him.

Q. Do you remember the time Famous Smith is said to have killed Jim Gentry?

A. Yes, sir.

Q. Well, where were you living at that time?

A. I was staying at old man Hollise's, about a mile and a half or two miles from the Falls.

Q. Did you see Jim Gentry after he was killed?

A. Yes. sir.

Q. Where?

A. At the Falls.

Q. What place there at the Falls?

A. When I saw him they had him there in the Falls in a little house.

Q. What were you doing there at that time at the Falls?

86 A. I don't know. I just happened up there. I don't know what I was doing.

Q. Were you working at old man Hollis'es?

A. Yes, sir.

Q. You happened to be in town that night?

A. Yes, sir; that evening.

Q. Did you see the body after it was undressed?

A. Yes, sir.

Q. Did you see any wounds on it?

A. Yes, sir.

Q. Where were they?

A. There was three wounds in the back, or sorter on the shoulders, in the shoulders like. That is al' the wounds I seen.

Q. On the left side?

A. Well, they were sorter nearly in the center of his shoulders. They might have been scattering. They were not all right together.

Q. Point on my back just about where you think they were?

(Witness does as requested.)

Q. You saw three holes in that part of the body?

A. Yes, sir.

Q. What were they doing with the body when you went in there?

A. When I walked in there they had him laid on the side, and one of these men that was working with him was sewing up these holes with a needle and thread.

Q. Had him laying on his side?

A. Yes, sir.

Q. Were you assisting in it, or were you just in there to look?

A. I just went into look. I just happened to go in there.

Q. Were there a good many in there?

A. Yes, sir; there were several in the room, but I don't know who they were.

Q. Was it daytime?
A. Yes, sir; it was getting dark.
Q. Did they have a light?
A. Yes, sir.
87 Q. Had him laying on his side and you discovered these holes?
Yes, sir.
Q. You didn't examine to see if there was any other holes there or not?
A. No, sir; I didn't. These are all the wounds I remember of seeing.

Cross-examination by THOS. H. BARNES:

Q. Didn't you state awhile ago, in the first part of your examination-in-chief, that all three of these w'unds were in the left shoulder.
A. No, sir.
Q. Didn't you say they were all in the shoulder?
A. I said they were in his shoulders like.
Q. Why did you say after that they were between the shoulders?
A. You can call it between the shoulders or in the shoulders.
Q. Then, after that, I believe you stated, in answer to another question, when the district attorney put the direct question to you as to whether they were in the left shoulder, that you could not remember which shoulder they were in. Is not that true, that you don't remember?
A. I don't remember which shoulder, but they were in between the shoulders sort of like.
Q. Your impression is that they were in the shoulder; but it has been so long ago, and I suppose you made no critical examination, and you could not be very definite about that, could you?
A. It has been a good while ago, but they were not all in one shoulder.
Q. What is your age.
A. 32.
88 Q. How long ago has this been?
A. It has been 10 years this summer—9 or 10.
Q. How do you know?
A. Because I know it was done in 1883.
Q. By any particular circumstance, or do you just think back, or how do you know it?
A. Because it was done in 1883; that is when I came away, in a short time afterwards.
Q. Were you living there?
A. I was living there then. I was staying there.
Q. Who with?
A. Old man Hollis.
Q. How long had you been there at that time?
A. I came there about the first of June.
Q. Where from?
A. I come from Fort Smith here. I went from Fort Smith up there.
Q. Did you live here?
A. Yes, sir.
Q. How long?
A. I had been living here then four or five years.
Q. Where did you come from to Fort Smith?
A. I come from Eufaula, or up on the Canadian, in the neighborhood of Eufaula.

Q. Where did you come from to Eufaula?
A. I come from Polk County, Arkansas.
Q. What brought you here to Fort Smith?
A. I just come of my own accord.
Q. There didn't any marshall bring you, I reckon?
A. No, sir.
Q. Just wandering around?
A. Yes, sir; just wandering around, I reckon.
Q. Have you been wandering ever since?
A. No, sir; I have not been wandering much.
Q. Where did you start out from?
A. From Polk County, Arkansas, this State.
89 Q. How old were you then?
A. I was about 15 years old.
Q. Did you run off from your daddy?
A. No, sir; I never run off.
Q. Did any of your people come with you?
A. Yes, sir.
Q. Who?
A. One of my aunts was with me.
Q. Where to?
A. When we left Arkansas we went to Webbers Falls, when we first left Arkansas.
Q. I thought you said you went to Eufaula. That is the way I understood you; you got up in the Indian country somewhere, turned up at Eufaula, and then you came to Fort Smith and staid awhile?
A. I said I came from Eufaula to Fort Smith, and from her' to Webbers Falls.
Q. That is when your aunt went with you, is it, when you went from here to Webbers Falls?
A. No, sir; she went with me there once, and I went back there by myself.
Q. That is to Webbers Falls, was it?
A. Yes, sir; I went to Webbers Falls once with her, and went once by myself.
Q. Did she go with you to Eufala?
A. No, sir.
Q. She didn't start out with you when you left Arkansas?
A. Yes, sir; she did.
Q. Did she go with you to Eufaula when you first left?
A. No, sir; she didn't. Went with me to Webbers Falls. I went to Webbers Falls and Eufaula, and down here, and in two or three years I went back to Webbers Falls again.
Q. That is the time you were there when you saw what you are telling?
A. Yes, sir; I was there ten years ago this summer, when I saw what I am telling about.
Q. When you were 15, when you first left home, is that when
90 you went to Eufaula?
A. No, sir.
Q. Where did you go then?

A. I went to Webbers Falls.
Q. Where did you go from W*b*eers Falls after you saw these shots?
A. I came back here.
Q. How long did you stay here after you came back that time?
A. I have been here ever since.
Q. You are right sure you saw the fellows back, are you?
A. Yes, sir; I saw three.
Q. How many?
A. Three.
Q. How was the man lying in the room when you saw him?
A. He was lying with his head towards the door.
Q. How large a room was it?
A. I do n't remember; it was not a very large room.
Q. Lying on his left side, was he not?
A. Yes, sir; he was lying on his left side, I believe.
Q. Which way were his feet?
A. They were toward the back of the house.
Q. What point of the compass.
A. The back of the house was so'th.
Q. That would be down the river there, would it not?
A. Well, no, not exactly; mighty near it—no, it wouldn't either.
Q. Settle down; I will give you time.
A. I do n't know exactly how the river does run there, anyhow.
Q. You walked up to the door?
A. Yes, sir; I stepped into the house.
Q. Several people around him?
A. There was several people in the house.
Q. What time of night was it?
91 A. It was getting dark; they had to have a lamp in there.
Q. How long had his remains been there?
A. I do n't know how long they had been there.
Q. Three or four hours?
A. I could not tell you anything about it, how long they had been there.
Q. Had they been there since the middle of the afternoon?
A. I could not tell you that.
Q. Where was you?
A. It was late when I got there to Webbers Falls.
Q. I suppose they had the man stripped when you saw him?
A. Yes, sir; they did.
Q. Naked all over?
A. Yes, sir; he was naked.
Q. Were all his clothing off?
A. Yes, sir.
Q. Is it not a fact that only his shirt was off at that time?
A. No, sir; they had everything off of him at that time.
Q. Where were his clothes?
A. I could not tell you anything about that.
Q. You didn't see any of them?
A. No, sir.
Q. You didn't see any holes in the clothing?

A. No, sir: I didn't.
Q. You do n't know what kind he wore?
A. No, sir.
Q. How long did you look at him—5 minutes?
A. No, sir; not more than a minute, I do n't reckon.
Q. When you went in you walked up to him?
A. When I walked in I walked around the side of the house that his back was turned to and staid in there a minute, maybe not so long, and walked out.

Q. He was n't so high but what you could see on both sides of him?

A. Yes, sir; he was laying up a foot and a half off the floor; a foot, anyhow.
Q. As you stood over that man——
A. I never stood over the man.
Q. How near to his back did you walk?
A. Well, maybe three or four feet; maybe five feet.
Q. How wide is the room?
A. I don't know how large it was.
Q. What is your idea?
A. I can not give much idea about it.
Q. Was it 16 x 18?
A. It was n't a very large room, though.
Q. Was it 18 x 20?
A. I think it was hardly that large.
Q. Was it 16 x 18?
A. I don't think it was that large.
Q. Give us an idea, if you have one.
A. As well as I remember, I think it was about 10 x 12.
Q. It was built for a barber shop?
A. Yes, sir.
Q. Then when you went in there you say you went in four or five feet of his back?
A. Yes, sir; I reckon.
Q. How large a space was there between you and the wall then?
A. I don't recollect anything about that. I don't remember whether I was standing against the wall or standing out in the floor. I was not right up over him.
Q. If he was only a foot and a half high, was laying there on his left side, or right side, you went in four feet of him; you could see over him; you were as tall then as you are now?
A. I never saw over him at all. This fellow that was working with him was standing over him.
Q. Who was working with him?
A. As well as I remember, I think it was Bob Lackey sewing up these holes.

Q. How many holes did you see him sew up?

A. I s'w him sew up one, I believe.

Q. Why didn't he sew up the others?

A. I don't know whether he sewed up the others or not; he was sewing up one.

Q. You could see that man well enough if he was stripped there, if he had any wounds in front anywhere you could have seen them, couldn't you?

A. I never seen that part of him at al'.

Q. If he had had any wounds in either one of the arms don't you think you could have seen them, on the outside of either of the arms?

A. I don't remember of seeing any there at all.

Q. Don't you think if he had been shot through the neck you could have seen that?

A. I don't remember of it. I never stood over him at all; I stood off a little piece from him.

Q. Suppose that man was on his left side, or his right side, and he was shot right through here (on neck) and you stood over him looking down on him——

A. I never stood over him.

Q. If you had stood in four feet of him looking down on him and seen what you have described, wouldn't you have seen that he was shot through the neck here, if he was shot there?

A. I do not remember of seeing only the wounds in the shoulders.

Q. Did you see any wounds in the man's neck?

A. No, sir; I did not; I do not remember of seeing any.

Q. How long did you stay at Eufaula when you first went up there?

Mr. CRAVENS (of counsel for defendant). Where is the first place you went to when you went to the Nation, when you were 15 years old?

A. I went to Webbers Falls.

Q. How long did you stay there?

A. I staid there a year and a half, or maybe 2 years.

94 Q. Where did you go from there?

A. I went from there up on the Canadian in the neighborhood of Eufaula.

Q. How long did you stay there?

A. I staid there about a month.

Q. Where did you go from there?

A. I came here to Fort Smith.

Q. How long did you stay there before you went back to the Falls?

A. Well, I don't remember; I must have staid here about 2 years, I reckon, before I went back; two or three years.

Q. How long had you been up at the Falls when you saw this dead m'n?

A. I had been there——

Q. You said four or five months awhile ago.

Mr. READ (the district attorney). No, sir; he did not say that.

Mr. CRAVENS (of counsel for defendant). I understood him to say that.

The WITNESS. I had not been there more than a month and a half. I think I went there the first of June.

Q. And you were there not more than a month or a month and a half before the man was killed?

A. Yes, sir.

Witness excused.

95 W. MORT MILLER, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. W. Mort Miller.
Q. Where do you live?
A. I live down here on the Wilson farm.
Q. Do you know Famous Smith, the defendant in this case?
A. Yes, sir.
Q. Did you know him personally?
A. Well, I lived at the Falls, and I seen him and visited with him.
Q. How long did you live there?
A. I believe I lived there about four years.
Q. Where did you go from to the Falls?
A. I went from Kansas.
Q. Where did you go from to Kansas?
A. From Indiana.
Q. Were you born in Indiana?
A. Yes, sir.
Q. How old were you when you moved to Kansas?
A. I think I was about 22 years old.
Q. How long did you remain in Kansas?
A. 18 years.
Q. And then moved from there down to the Territory?
A. Yes, sir.
Q. How long did you stay in the Territory?
A. I think I staid there pretty near four years, most of the time at Webbers Falls, right at it.
Q. Who did you live with at Webbers Falls?

96 A. I lived one year on Bill Vann's place, and then I lived the other time on John Drew's place.

Q. When did you leave there?
A. I left there, I think, in the fall of 1883, if I am not badly mistaken.
Q. Where did you go to from there?
A. I came here from Fort Smith.
Q. Have you lived here ever since?
A. Yes, sir.
Q. Did you know Jim Gentry?
A. I just knew him when I saw him.
Q. You were not personally acquainted with him?
A. No, sir; I were not.
Q. Did you see him after he was shot?
A. Yes, sir.
Q. Where was he at that time?
A. Well, he was laying on a porch, I just forget the man's name, on Mr. Smith's place though.
Q. Mr. Russel?
A. Yes, sir; on Mr. Russel's porch.
Q. Who was there at the time?
A. I could not tell you who all was there.

Q. How long was it after the shooting that you saw him?
A. Well, it may have been an hour or an hour and a half.
Q. Did you notice any wounds on his person?
A. I noticed one.
Q. Where was it?
A. In the neck.
Q. What part of the neck?
A. As near as I can tell it was in through the neck here somewhere; I could not tell what direction it was in, only it was through the neck.
Q. Was it through the side of the neck?
A. No; I think it was kind of through this direction; kind of went in that way (indicating).
Q. Went in from the back?
A. It went in kind of in here, not direct from the back, but more at the side, and straight through; it angled a little, as near as I can tell.

Mr. CRAVENS (of counsel for the defendant). It angled here
97 and came out further to the front?

A. Yes, sir; as near as I can tell, from the way he was laying. I didn't notice which way it went in or anything about it, only from looking at it. I just stepped up and looked at it and stepped back.

The DISTRICT ATTORNEY. Did you notice whether there was any powder marks there, powder burns?
A. No, sir; I did not get close enough to examine it.
Q. Did you see any other wounds on him?
A. No, sir.
Cross-examination waived. Witness excused.

98 R. E. BLACKSTONE, having been duly sworn upon behalf of the Government, was examined by the assistant district attorney, Mr. John B. McDonough, and testified as follows, to wit:

Question. Your name is R. E. Blackstone?
Answer. Yes, sir.
Q. You live at Webbers Falls?
A. Yes, sir.
Q. You are a merchant there, I believe?
A. Yes, sir.
Q. Do you know the defendant, Famous Smith?
A. Yes, sir.
Q. Did you know James Gentry in his lifetime?
A. Yes, sir.
Q. Were you doing business at Webbers Falls at the time Gentry was killed?
A. Yes, sir.
Q. Where were you on the day of the killing?
A. I was in the store.
Q. Did you see the defendant that day?
A. Yes, sir.
Q. After or before the killing?
A. Afterwards.
Q. Was he at the store?
A. Yes, sir.

Q. What was he doing there?

A. He came into the store, and as well as I remember he did some little trading.

Q. Do you know what he bought?

A. I think he bought some cartridges; I am not positive of anything else.

Q. That was what time in the day?

A. I would judge it to have been about 2:00 o'clock in the evening.

Q. Where did he go after he bought the cartridges?

A. He and Mr. Frank Vore went out of the door, and I did not see him any more.

Q. Did you have any conversation with the defendant?

99 A. No, sir.

Q. I mean about the killing of Gentry?

A. No, sir.

Q. Did you and do you now know Ned Smith?

A. Yes, sir.

Q. Did you see a knife that was said to have been picked up by him?

A. Yes, sir.

Q. Picked up at the place of the killing?

A. Yes, sir; he showed me a knife that he said he picked up there.

Q. Did you know Gentry?

A. Yes, sir.

Q. Was he working for you at the time that he was killed?

A. Yes, sir.

Q. Had you ever seen the knife which he owned; his own knife?

A. I saw him with a knife.

Q. State whether or not in your judgment the knife that was shown to you by Ned Smith was the same knife, was Gentry's?

A. Well, it was the same kind of a knife; it did not look like it was the same knife.

Q. What was the difference between them?

A. Well, it has been a good while ago, and well as I remember it looked a little older.

Q. Which knife looked older?

A. Gentry's knife seemed to be older.

Q. Older than the one that was shown to you by Smith?

A. Yes, sir; but there wasn't much difference, and I could not be positive.

Q. State whether they appeared to have come out of the same box.

A. Yes, sir.

Q. Did you have these knives in your stock?

A. I don't know whether I had them then or not; I had been keeping them to sell.

Q. Rocky Smith was working for you at that time?

A. Yes, sir.

100 Q. He was a brother to Famous Smith?

A. Yes, sir; a half brother.

Q. What statement did you make to Ned Smith at the time that he showed the knife to you.

Mr. CRAVENS (of counsel for defense). We object to that.

The ASSISTANT DISTRICT ATTORNEY. How long had you known Gentry?

A. I had not known him very long.

Q. Was he working for you at the time?

A. Yes, sir.

Q. How long had he been working for you?

A. He had not been working for me but a few days.

Q. Do you know how long he had been in that community there?

A. No, sir; I don't; I don't remember.

Q. State whether or not he was a citizen there, and whether he was recognized as such, or whether or not he was a citizen of the United States, not having citizenship there?

Mr. CRAVENS (of counsel for defendant). The question is, was he an Indian or a white man?

The WITNESS. I could not state whether he was an Indian or a white man.

The ASSISTANT DISTRICT ATTORNEY. Did he exercise any rights of citizenship there?

A. Not that I know of.

Q. State whether or not the authorities in any way recognized him as a citizen there.

A. They did not recognize him.

Cross-examination by Mr. THOMAS H. BARNES:

Q. You say you could not tell whether this man Gentry was an
101 Indian or not; I believe that is what you first said, and then you stated that the authorities did not recognize him as an Indian; what authorities do you refer to?

A. Well, in one instance he wanted to vote there, and he was not allowed to vote.

Q. Were you present or did you just learn that?

A. I was on the ground, but——

Q. Were you right at the polls?

A. I am not so positive about that.

Q. You just learned of that there at the time, I suppose?

A. Yes, sir.

Q. That is the way you fix it?

A. Yes, sir.

Q. Is there a requirement of your Cherokee laws there that a man shall live in the district six months before he shall vote, or was there at that time?

A. There is a requirement that he shall live in the district six months before he shall vote for certain offices, but he is allowed to vote for chief no matter——

Q. That was not an election for chief, was it? That was an election for district officers, was it not?

A. We hold them all at the same time, with the exception that now the chief is changed, and holds his term for four years.

Q. What I want to know on that is, is it not true that that was not a general election for all the officers at that time?

A. I do not remember about that.

Q. What year was that?

A. I could not be positive; I think it was in 1883.
Q. You think it was the same year of the killing?
A. Yes, sir.
Q. Of your own knowledge you do not know anything about the citizenship of this party, I suppose, just information?
102 A. No, sir; that is all.
Q. You have a brother who lives in the Creek Nation, have you not?
A. Yes, sir.
Q. He is an Indian, is he not?
A. Yes, sir.
Q. He is a Cherokee, is he not?
A. Yes, sir.
Q. Do they allow him to vote in the Creek Nation.
A. No, sir.
Q. And still he is an Indian?
A. Yes, sir.
Q. At the time you saw the defendant there at the store he was only in there, I believe you say, a short time?
A. Yes, sir.
Q A few minutes, or a minute, or how long? Just long enough to do trading, and then did he step out?
A. Yes, sir; just a few minutes. Four or five minutes, I expect.
Q. Who did he get the cartridges from?
A. From Mr. Vore.
Q. Were there other customers in the store at the time?
A. There wasn't many.
Q. The store was not crowded?
A. No, sir.
Q. And Mr. Vore is the one he did his trading with?
A. Yes, sir.
Q. He is the one he talked to?
A. Yes, sir.
Q. And then they stepped out together.
A. Yes, sir.
Q. Did you see him any more that day?
A. No, sir.
Q. Mr. Ned Smith, whom you speak of, was also clerking for you at that time, was he not?
A. Yes, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. What was this election at which Gentry tried to vote?
A. It was an election held in the Cherokee Nation.
103 Q. For what purpose?
A. To elect officers to fill different positions in the Nation.
Q. It was a general election, was it not?
A. Well, it was a general election so far that it may possibly have not been an election that included the chief and circuit judges, who are elected for four years. Out other election for offices are held every two years, and and all officers are elected for two years except the chief and circuit judges.

Q. That is, in the Cherokee country?
A. Yes, sir.
Q. At that time were they not all elected together?
A. They might possibly have been, but I would not be positive about that.
Q. You are not positive, then, whether this was an election for chief or not?
A. No, sir.
Q. If it was an election for chief any Cherokee had a right to vote whether he had been there the requisite length of time or not?
A. Yes, sir.
Q. Do you remember any other instance when the authorities refused to recognize him as a citizen up there?
A. I don't remember of any.
Q. Had he entered any land or taken up any improvements?
A. Not that I know of.
Q. You heard the matter discussed, of his not being allowed to vote on the grounds that day, didn't you?
A. Yes, sir.
Q. And it was determined not to let him vote, on the ground he was not a citizen?
A. Yes, sir.
Mr. BARNES (of counsel for defendant). He did not say that.
The DISTRICT ATTORNEY. That is what he says.
Mr. BARNES (to witness). Do I understand you to say that you
104 simply learned there they *they* did not allow him to vote, or did you say that you heard them refuse him a vote?
A. You understood me to say they did not allow him to vote.
Q. That is, you heard somebody else say so?
A. Yes, sir.
Q. You did not hear the officers of the election, you do not know what they determined?
A. I heard my brother say so.
The DISTRICT ATTORNEY. Was your brother an officer of the election?
A. Yes, sir.
The COURT. Do you know where Gentry was born and raised?
A. No, sir.
Q. You never heard him say?
A. No, sir.
Q. Do you know where he came from to the Nation?
A. No, sir.
Witness excused.

105 MILLARD FILLMORE, having been duly sworn on behalf of the Government, was examined by the district attorney, Mr. James F. Reed, and testified as follows, to wit:

Question. What is your name?
Answer. Millard Fillmore.
Q. What are you?
A. I am a Cherokee, I guess.
Q. Are you any relation to Famous Smith?

A. No, sir.
Q. To his wife?
A. No, sir.
Q. How far do you live from Webbers Falls?
A. I live three or four miles above the Falls.
Q. Where did you live in 1883?
A. Right at the same place.
Q. Did you have an election in 1883 up there?
A. I guess that is the year; it will be 10 years this election next August.
Q. Was it a general election?
A. No, sir.
Q. What was it for?
A. To elect district officers.
Q. Do you remember Jim Gentry?
A. Yes, sir; I remember his name.
Q. Were you acting in any official capacity there that day?
A. Yes, sir; I was one of the judges.
Q. How long had you known Gentry?
A. I *seed* him around there that spring and summer before the election.
Q. Was he permitted to vote there that day?
A. No, sir; he never voted.
Q. Why was he not allowed to vote?
A. Blackstone, the other judge, told him he had not been in the district long enough.
Q. Do you know whether that was the reason or because he had not been, and was not, recognized as an Indian?
A. I don't know; he told him he was satisfied he was an In-
106 dian, and he walked out. There was no argument about that at all hardly.
Q. Didn't you tell Mr. McDonough, the assistant district attorney, here the other day, that you did not know what ground it was that he was refused a vote on, down here in the district attorney's office?
A. No, sir; he asked me if he voted and I told him no, and that is about as far as I went.
Q. Didn't he ask you the grounds on which they refused him a vote?
A. He had not been in there long enough in the district.
Q. Didn't you tell him you did not know what the grounds were or whether it was that or not?
A. I told him it had been so long ago that I had sort of forgot it.
Q. Hadn't you forgotten it? Was not that the truth?
A. Yes, sir.
Q. What has refreshed your memory about it?
A. I got to studying about it; I got to thinking about it after he asked me the question.
Q. Haven't you been talking to Col. Cravens or Mr. Barnes, counsel for the defendant?
A. No, sir; I don't know them.
Q. You never saw them before?
A. I have seen one of them?
Q. How long have you been here?

A. I have been here about a week, I think.
Q. Which one of these gentlemen is Mr. Barnes?
A. I can't tell you.
Q. You can not tell to save your life. Which one is Mr. Cravens?
A. I don't know either one of them.
Q. You never saw them. Where have you been studying about this thing now?
A. Well, when he commenced to ask me I allowed that is what they summoned me down here for.
107 Q. You told him you didn't know; it had been so long ago you didn't know. Where did you go to study about it?
A. I just got to studying about the election after he named it.
Q. You went off and got to studying about it?
A. Yes, sir.
Q. Are you certain that is the reason they did not allow him to vote, because he had not been there that long?
A. That is the way I remember it. That is why I think he was put off.
Q. Don't you know that he had been there since the fall before, in that Canadian district?
A. No, sir; I don't.
Q. You don't know anything about it yourself, then?
A. No, sir; only I saw him around there that summer or spring.
Q. All you know is what you saw now you heard Mr. Blackstone say?
A. Yes, sir; I was mostly interpreter.
Q. You were not paying much attention to anything else except that?
A. No, sir.
Q. You have not been talking to anybody about this at all?
A. No, sir.
Q. Not even to the witnesses in the case?
A. Yes, sir; some of them asked me what I was down here for, and I told them I guess it was something about an election.
Q. They talked to you about that matter, too, didn't they?
A. No, sir; they asked me what I was here for, and that is all.
Q. Who was that asked you?
A. It was some fellow, he didn't belong here at all—he didn't belong to the court at all.
Q. You have not talked to any of the witnesses at all?
A. No, sir.
Q. Not one?
A. No, sir.
Q. You knew all these people from up there, don't you?
108 A. I know a great many.
Q. You know nearly everybody who lives around Webbers Falls?
A. Yes, sir; I know a good many.
Q. And you have not talked to anybody at all. You did not interpret for Gentry, did you?
A. No, sir.
Q. He could talk English could he not?
A. Yes, sir.
Q. Do you all have courts up there in that country?

A. Yes, sir; sometimes.
Q. Is it any harm for one Cherokee to kill another?
A. I guess so.
Q. Do you ever try men up there for murder?
A. Yes, sir.
Q. Was Famous Smith ever tried up there for the murder of Gentry?
A. Not that I know of.
Q. You saw Famous after he had killed Gentry, didn't you?
A. Yes, sir; I have seen him.
Q. Didn't you see him frequently?
A. No, sir.
Q. You lived in a mile or two of him, didn't you?
A. Yes, sir; he lived there in the neighborhood.
Q. Right there in the neighborhood?
A. Yes, sir.
Q. Did you not see him around that neighborhood frequently after he had killed Gentry?
A. No, sir.
Q. Where was he?
A. I don't know where he was.
Q. Was he scouting?
A. I guess so; I don't know anything about that.
Q. You didn't see much of him, did you?
A. No, sir.
Q. Was he not around home there all the time when you wanted to see him?
A. Well, I don't know that; I never was to his house.
Q. And you never heard of his being arrested and tried for this thing up there?
A. No, sir.
109 Q. And this election you speak of, how long did this election occur before the killing?
A. I don't know anything about it, what time it was. I don't remember that. After the election was over I went home and found one of my children bad off sick.
Q. You went home and found one of your children sick, and you never thought about anything else?
A. No, sir.
Q. You heard about the killing, didn't you?
A. Yes, sir.
Q. How long after it took place?
A. The same day, I think.
Q. Can't you tell how long that was after the election?
A. No, sir.
Q. You elected circuit judges at that election, didn't you?
A. Yes, sir.
Q. Who was elected circuit judge?
A. Well, I have forgotten that, too.
Q. What other officers did you elect?
A. Well, I don't recollect their names.
Q. Didn't you elect a chief?
A. No, sir.

Q. When did you elect a chief?
A. We elect him every four years, but that was not any chief election.
Q. How do you know it?
A. I know it.
Q. You don't remember who was elected?
A. No, sir; I do not remember the officers.
Q. How do you know they did not elect a chief?
A. I know it; I know it was no chief election.
Cross-examination waived. Witness excused.

110 FANNIE STARR, having been duly *sworn* upon behalf of the Government, was examined by the asssistant district attorney, Mr. J. B. McDonough, and testified as follows, to wit:

Question. What is your name?
Answer. Fannie Starr.
Q. Where do you live?
A. Briar town, Indian Territory.
Q. How far from Webbers Falls?
A. It is called 15 miles.
Q. How long have you lived there?
A. Right where I am living; I have been there about 7 years.
Q. Do you know Famous Smith, the defendant here?
A. Yes, sir.
Q. Did you know Gentry in his lifetime?
A. No, sir.
Q. Where were you living at the time of the killing of Gentry?
A. We were living down on the Canadian River.
Q. What direction from Webbers Falls?
A. It is, I guess, south.
Q. How far?
A. It must be about 18 miles, I guess about that, and about three miles from where we live now on the river.
Q. On what river?
A. On the Canadian River.
Q. Did you see the defendant Smith after the killing?
A. Yes, sir.
Q. How long after the killing?
A. The next morning after the killing.
Q. Where did you see him?
A. I saw him at our house.
Q. Just go on and state the circumstances of your seeing him; how he came up, and what occurred there, and what was said?
A. Well, it was about 10 o'clock in the morning, and my attention was attracted by him throwing some peaches over in the yard, and
111 when I noticed I looked out into the orchard and he stood by a little house made over a grave; he was standing there, and he kind of excited me to see him act in such a way, and I went to the palings of the yard fence and asked him what was the trouble, and he said he had got into trouble the morning before; that he had killed a man; I asked him who he had killed, and he said that his name was Jim Gentry. He said they had got into some trouble about a horse. I think this Gentry was

riding the horse. I do not know whose horse it was, whether it was his or not; but they got into trouble about the horse. He had rode the horse down; he had told him to bring the horse home, and he had rose a trouble some way or another, and when he brought the horse he said he tied the horse somewhere about the place, I don't recollect——

Q. About Famous Smith, the defendant's place?

A. Yes, sir; and went on up to George Vann's after his clothes, he said.

Q. That is, Gentry went up to George Vann's after his clothes?

A. Yes, sir; and when he came on back he said—I understood him to say that he had gone down the road, and as Gentry came on then the difficulty takenn place.

Q. That he, Smith, had gone down the road?

A. Yes, sir.

Q. As Gentry came on back the difficulty took place?

A. Yes, sir.

Q. Go ahead.

A. He was striking at him with a loaded quirt and he shot him.

Q. Did he say how many times he shot him?

A. I think he said he shot him three times after he fell off of his horse.

Q. How many times did he say he shot him altogether?

A. I don't know as he said how many times; I was not interested in it and I did not make any memorandum of it, it has been so long ago.

112

Q. He said that Gentry was trying to hit him with a loaded quirt?

A. Yes, sir; trying to strike him with a loaded quirt, and that is the reason he shot him.

Q. Is that the first conversation he had with you; when he first came up what did he say?

A. That is what he said—well, first he said that he wanted to go over the river, and I told him I did not know of any way for him to get over the river, that maybe the old man could tell him; he wasn't about the house; he had drove off. And he wanted to know where my brother was. I had a brother that was on the scout and he wanted to know where my brother was, and he said that was his business there, to find out where my brother was.

Q. Who is that brother?

A. His name was Tom Griffin.

Q. He said that was his business there, to find out where he was?

A. Yes, sir. I asked him in the yard and he came over the fence, came in the house and staid until after dinner.

Q. Did you tell him where your brother was?

A. I didn't know where he was.

Q. Did he say anything about——

Mr. CRAVENS (of counsel for defendant.) Let the witness state what he said.

The ASSISTANT DISTRICT ATTORNEY. What did he say as to the whereabouts of your brother?

A. He asked me if I had heard from Tom or where he was, and I told him that I hadn't. He said he wanted to get with him.

Q. Did he know your brother was on the scout?

A. Yes, sir; he knew it.

113 Q. Did he say anything about his knowledge of where your brother was himself?

A. No, sir; he didn't know anything about where he was, I suppose.

Q. Then after that he went on with this conversation about the difficulty?

A. Yes, sir.

Q. In that statement did he at any time say anything about the man trying to use a knife on him?

A. No, sir.

Q. Did he say anything about a knife being used in the difficulty at all?

A. No, sir; he didn't tell me anything about a knife. He said there was a knife found there on the ground afterwards. He told me that the man was striking at him with a quirt and he shot him.

Q. And that he shot him three times after he was off his horse?

A. Yes, sir.

Q. Did he say where he hit him?

A. No, sir; he did not say, or if he did I do not recollect it?

Cross-examination by Mr. THOMAS H. BARNES:

Q. Your name is Fannie Starr, I believe you say?

A. Yes, sir.

Q. Your maiden name was Griffin?

A. Yes, sir.

Q. Were you living with your husband at the time of this occurrence?

A. Yes, sir.

Q. Where was your husband that morning?

A. He had rode off; I don't know just where he was gone. He attends to stock, and he nearly always is gone. I could not tell you where he was gone.

The DISTRICT ATTORNEY. I desire to ask the witness one more
114 question. How far did you live from where Famous Smith lived at that time?

A. He lived at the Falls, and we lived about 18 miles from the Falls. He lived at or near the Falls; I don't know just how far it is.

Mr. BARNES (of counsel for defendant). The first thing you knew of his being there you saw him there at your house in the yard?

A. Yes, sir; and throwing peaches over the fence.

Q. Did you have peaches there at your place?

A. Yes, sir.

Q. What was he throwing peaches over the fence for?

A. To attract my attention, I suppose.

Q. He could have spoken to you, could he not?

A. I guess he could if he had wanted to.

Q. How far off was he?

A. He was, I guess, 20 or 30 yards, or may be more. He asked me if there was anybody there.

Q. You knew him?

A. Of course I knew him.

Q. How far were you from the house?

A. I was right in my kitchen door.

Q. You spoke to him first, did you?

A. Yes, sir; I asked him what was he doing out there.

Q. That is the language you addressed him in, "What are you doing out there?"

A. I said, "What are you doing out there?"

Q. You stated to the district attorney awhile ago that you asked him what the trouble was?

A. After I got to the fence I asked him what the trouble was.

Q. Then that was not the first remark you addressed to him? The first remark you addressed to him, then, was to know what he was doing out there; that was the first, was it?

A. Well, I could not tell just what the first remark was, but
115 that was the general conversation.

Q. You undertook to give the details of the conversation, and now, then, you say to this jury you cannot say whether you asked him first what the trouble was or what he was doing out there?

A. I first asked him what he was doing out there.

Q. You settle down on that now, do you?

A. Yes, sir; that is what I asked him, what was he doing out there. It surprised me to see him. When he came to our house before he always rode up to the front gate and got down and came in, and to see him out there acting that way, why I could not imagine what was the matter, and I asked him what he was doing out there.

Q. You state it surprised you. You stated that a while ago?

A. Yes, sir; it surprised me.

Q. Of course, when you think about it, the first remark you would address him would be what he was doing out there instead of asking him what the trouble was. It has been along time ago?

A. Yes, sir; and I never paid any attention to it.

Q. I believe you say you didn't charge your mind very carefully with it?

A. Yes, sir.

Q. And you were not very much concerned about it?

A. No, sir; I was not interested at all.

Q. It didn't concern you or interest you much to know that a man had been killed?

A. No, sir; I didn't know him.

Q. It didn't concern you, and therefore you did not charge your mind?

A. No, sir; I didn't charge my mind.

Q. Now, then, you remember that he told you that he and the man met on the road. Is that right? After telling about this horse, as you
116 say, that the horse was rode down and tied somewhere, I understood you to say that he went down the road and the man came on by. Did he not say they went down the road together—started from his house together—and that the quarrel came up as they were going down the road, a few hundred yards from his house?

A. I don't know whether he stated that or not.

Q. It might be that way?

A. I don't know. I understood him to say that he went down the road, and as the man came on b' then they had the quarrel.

Q. You have it in your mind that they got together somewhere on that road; you will not be positive whether he claimed they met or that this man was at his house and they were going down the road when it came up—which is it?

A. I don't know.

Q. You would not be very positive anyway. You are satisfied he told you it occurred on the road?

A. Yes, sir.

Q. That far you are sure?

A. Yes, sir; he said they were on the road.

Q. They were on the road when this came up?

A. Yes, sir.

Q. You do not undertake to give everything he told you about how the difficulty came up?

A. No, sir; because he staid there a half a day, and I could not say what he said. It has been a long while ago.

Q. Might he not have said that the man attacked him with a loaded quirt, and then that after that he attacked him with something else?

A. He didn't say it if it had been that way.

Q. You remember his saying that he shot him three times?

A. Yes, sir.

Q. Might he not have said that he shot him three times while he was on his horse?

A. He might have said it if he wanted to, but he told me what I have stated.

117 The DISTRICT ATTORNEY. She has answered that two or three times.

Mr. BARNES (of counsel for defendant). Never mind 'er; she is smart enough to take care of herself.

The WITNESS. I may be smart enough, but I haven't had as much practice as you have. (Laughter.)

Q. You are not very friendly to Famous Smith, are you?

A. No, sir; I am not friendly to Famous.

Q. Do you remember of his speaking of shooting the man three times? ou have mentioned that?

A. Yes, sir.

Q. Didn't he tell you that he shot the man three times while he was on his horse?

A. No, sir; he didn't.

Q. How is it that you charged your mind with his telling you about it after he was off the horse, and don't remember what he said about shooting him when he was on the horse?

A. I don't know; I recollect very well him saying that he shot him three times.

Q. Did he not say that he shot him three times and shot him off the horse when he hid shoot him three times that he shot him off; caused him to fall from the horse?

A. He didn't say whether he shot him off the horse ——

Q. You say here that he shot him three times off his horse, don't you?

The DISTRICT ATTORNEY. No, she did not.

Mr. BARNES (of counsel for defendant). Shot after he was off his horse?

A. I suppose that is what he said, that he shot him three times after he was off the horse.

Q. Did he put the word "after" in there, or did he say he shot him three times off his horse?

A. I could not recollect that now, because I didn't notice; I
118 did not pay that particular attention to it.

Mr. CRAVENS (of counsel for defendant). You were not paying close attention at all, were you?

A. It is just the same as anybody else getting up here and telling something; they would not put all of these little words in there and recollect them all.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say you do not know what particular words that he used, but he did say that he shot him three times?

A. Yes, sir; shot him three times; that was the substance of it; I don't know what words that he used. I could not say that he said whether he shot him from his horse or off his horse, but that was the substance of it as I have said it, and that is what I am trying to tell.

Q. Did you understand from him that he shot him three times ——

A. After he was off from his horse on the ground. I don't know whether he shot him and he fell off of his horse or not.

Q. But the impression made on your mind was that he shot him three times after he was off his horse?

A. Yes, sir.

Q. You stated a moment ago you did not know where your brother was at the time that Famous was there?

A. No, sir; I did not know.

Q. Did Famous ask you with reference to any one place as to where he was?

A. I told him that when we heard from him last that he was in Mexico, and he said he wanted to get with him. He said that is what he came there for.

Q. Did he ask you his address, where he was?

A. Yes, sir; he wanted his address, wanted to know where he was.

119 Q. Did you know where he was?

A. No, sir; I didn't know where he was.

Q. Do you know whether he had ever heard he was in Mexico prior to to that time or not?

A. I don't know whether he had or not.

Recross examination by Mr. THOMAS H. BARNES:

Q. He came there and wanted to get with him, going on the idea as though he was in the country at the time; he thought you knew his whereabouts?

A. Yes, sir; he thought I knew where he was.

The COURT. Was he in Old Mexico at that time?

A. Yes, sir; I suppose so. When we got the last letter from him in May he was in Chihuahua.

Q. Where is he now?

A. He was killed at Eufaula in 1884.

Mr. BARNES (of counsel for defense). I thought it was Felix that was killed at Eufaula?

A. No, sir.

Witness excused.

Government rests.

120 This was all the testimony on the part of the Government and the defendant to maintain the issues on his part, being sworn himself, testified as follows:

121 FAMOUS SMITH, having been duly sworn in his own behalf, was examined by his attorney, Mr. William M. Cravens, and testified as follows, to wit:

Question. Your name is Famous Smith, is it not?

A. Yes, sir.

Q. How old are you?

A. 40 years old.

Q. You have been sick all the time since you have been in jail, and have lung trouble, havn't you?

A. Yes, sir.

Q. Where do you live?

A. I live about three miles above Webbers Falls.

Q. Where were you raised?

A. I was raised right there close to Webbers Falls.

Q. Are you an Indian?

A. Yes, sir.

Q. What tribe of Indians do you belong to?

A. I am part Creek and part Cherokee.

Q. You are a citizen of the Cherokee Nation?

A. Yes, sir.

Q. You were raised, I believe, in the neighborhood of Webbers Falls?

A. Yes, sir; I have lived there ever since the peace was made, right around there.

Q. Did you know Jim Gentry in his lifetime?

A. Yes, sir.

Q. How long did you know him? How long had he been in that neighborhood that you knew of?

A. He came there I reckon it must have been about the first of April, and I saw him a few times before that on the Canadian.

Q. Down at that mill in the Choctaw Nation?

A. No, sir; he was logging right across the river in the Choctaw Nation. He was on both sides of the river.

122 Q. But he had only been in the neighborhood of Webbers Falls in the Canadian district since the first of April?

A. I think, as near as I can recollect, about the first of April.

Q. Was he at work there?

A. Yes, sir; he was working for me.

Q. Who did he begin work for as soon as he came there?

A. He went to work for me when he came there first.

Q. How long did he work for you?

A. He was there from about the first of April to August.

Q. What time in August?

A. I think it was the 9th of August.

Q. What kind of work was he doing for you?

A. He was logging for me.

Q. Hauling logs?

A. Yes, sir.

Q. Where to?

A. He was hauling to the mill at Webbers Falls.

Q. Had you paid him for his work?

A. Yes, sir; I kept up with his wages. When I first hired him I gave him a dollar a day, and he worked about 2 months at a dollar a day, and he kept up ahead of his time all the time, and I told him that I would just let him have a team for half what he could make, and he could pay his own expenses.

Q. He first worked for awhile at a dollar a day, and you told him you would let him have a team and he pay the expenses, and you would divide the profits equally between you?

A. Yes, sir.

Q. When did that arrangement take place?

A. As well as I recollect it was about the first of June.

Q. How did you and he get along?

A. We got along very well up until just a short time before the trouble came up. He was riding a horse and he would not working hauling there, and I told him to quit riding the horse.

123 Q. If you had any trouble about a horse, or anything else, just tell the jury about it.

A. When I first turned the horses over to him I told him he could use them if he did not use them too hard; that he could use them right around the neighborhood there, and he drove one of them pretty hard, and I told him——

Q. Where did he ride it to?

A. Around there in the neighborhood around. He was out every night. And I told him then to quit riding them, to turn them out.

Q. Was that the horses that he was working?

A. No, he was driving cattle.

Q. He was logging with an ox team?

A. Yes, sir.

Q. But you just let him have the use of these horses to ride around, if he would use them moderately?

A. Yes, sir; on Sundays.

Q. And he got to riding every night, and quit work, and then you made the complaint?

A. Yes, sir.

Q. Now go on and tell what took place between you—I mean with reference to the horse.

A. Well, after I told him to quit riding he got mad at me about it. I told him then that he must not ride the horses at all; and I went off—it was election time—and I went off out in the district there, and he caught one of my horses and rode it off, went down in the Choctaw Nation; he said he went down there——

Q. You went off in the district, or went off about the election, and was gone awhile and while you were gone he rode one of the horses off?

A. Yes, sir; catched one of the horses, and was gone about a week on the horse.

Q. What was the condition of the horse when he came back?

A. He just rode it plumb down when he brought it back.

124 Q. What did he do with the horse?

A. I told him the day of the election at the Falls to take the horse home and turn it loose, and he did not take it home I do not think; he turned the horse loose, though.

Q. You saw him with the horse at the election, at the Falls?

A. Yes, sir.

Q. You told him to take the horse home and turn it loose?

A. Yes, sir.

Q. Go on from that and tell everything that took place between you.

A. I never saw him any more until the day that he came up home there. I never saw him to speak to him.

Q. You never saw him to speak to him until the day he was killed?

A. No, sir; I never saw him any more until that.

Q. How long was that after the election?

A. The election was on a Monday, and if I am not mistaken I think it was the Thursday afterwards.

Q. Of the same week, or Thursday week afterwards?

A. The same week of the election, I think.

Q. He came to your house that day, did he?

A. Yes, sir.

Q. Now, tell the jury just what took place between you and him?

A. He came there and said he was going to quit there and go to work for Blackstone, and I asked him what about what he owed on the saddle. He had got a saddle and I had stood good for him; he went and bought a saddle and he did not pay it all, only $7.00, or $7.50, and I had that to pay.

Q. You had to pay $7.50 on the saddle you stood good for?

A. Yes, sir.

125 Q. What was it you said to him about that?

A. I told him if he wanted to do what was right about it he would leave the saddle there until he got the money and come and take it, and he told me that he would not give the saddle up at all. He told me that he just naturally would not give it up; that he needed it; that he was going to work on a ranch, I think he said. I told him that if he would give me security for the saddle, with Mr. Blackstone, if he was going to work for him, it would be all right, and he said he would go down to see him, and he went off. I was eating my dinner. He went off up to George Vann's. I was eating my dinner when he came back, and he told me, "Let's go down to the Falls, and we will have Blackstone——"

Q. After having this conversation he went off to George Vann's?

A. Yes, sir.

Q. When he came back you were eating your dinner, and he then proposed for you to go down to the Falls and see Blackstone?

A. Yes, sir.

Q. That is, about this security business?

A. Yes, sir.

Q. Go ahead.

A. I told him then that I wanted to look for some cattle that day; it didn't make any difference if it was all right with Blackstone; I could see Blackstone some other time; and he kept begging me to go to the Falls with him.

Q. You wanted to go to hunt cattle?

A. Yes, sir.

Q. But he begged you to go with him?

A. Yes, sir; and finally I consented to go, and we went on down the road.

Q. How did you go?

A. We went horseback.

Q. What was he riding?

A. He was riding one of Blackstone's horses.

126 Q. What kind of a horse?

A. Brown horse; what I would call a brown; some might call him a bay; dark bay or brown.

Q. Do you remember what the horse was called?

A. I don't know exactly the horse's name, but it was a brown horse that he bought there from Dr. Moore. I think they called him the Dr. Moore horse.

Q. You started down the road finally, did you; both horseback?

A. Yes, sir; we started down the road, and after we got outside of the yard there he commenced quarreling at me, and I asked him what did he mean by it.

Q. How far did you get away from the place before he commenced?

A. We got on the outside, started from the gate down to the road, when he commenced on me, and we went on down the road, kept riding along and he kept cursing me. I just rode on down with him until we got down nearly to Russel's house—about 100 yards of Russel's house—and I told him then—he told me, though, that me or him, one, would have to die that day. And he kept cursing me about the horses, and I asked him if they were not mine and if I did not have a right to do what I pleased with them, and he said he wanted to go to a picnic, and I told him I had no horse for him to go to the picnic on in that hot weather. It was hot weather, and he had just nearly killed one that he had ridden. We went on down the road, and I kept riding on with him until we got down nearly to Russel's, and I told him that if that was what he wanted me to go down to the Falls with him for I would go back home. I says, "You say me or you, one, has got to die before night. I will go back home, and I will know what to depend upon whenever you come back to my house again."

127 Q. You called his attention to what he said, and you told him you would go back home, and you would know what to depend on if he came back there?

A. Yes, sir. When I stopped my horse to turn back he moved on a little further, and when he got a little ahead of, he turned his horse back facing me, and he says, "Come on and go to the Falls, as you have started," and I told him no, I would not do it; I was going back home; I did not care about fussing with him; I didn't want to fuss with anybody. And he said I had to go. I told him I wouldn't. He told me then that he had been wanting to get hold of me for some time, and he started after me with a knife, and I told him to stop. I had a pistol, and I drew my pistol and I told him to stop, and he cursed me again and he told me I would not shoot, and he made at me with a knife, and as he made at me with a knife, he struck at me with the knife and I knocked the lick off,

and when I knocked the lick off he cut at me again, and his horse kind of dodged back, and I shot. I shot twice right then, and the horse kind of pitched off from him, and he came back, and stopped there about long enough for me to shoot once or twice.

Q. You shot at him twice when he came up and cut at you first, and you knocked the lick off and you shot at him twice?

A. Yes, sir.

Q. And his horse pitched off, and then he came again at you?

A. Yes, sir.

Q. And then you shot a time or two again, you say?

A. I do not know whether I shot twice or three times. He run right up to me on the horse and the horse I was riding dodged off, and he still kept kept coming, and I shot twice, I think, maybe three times.

128 Q. That is, after he came at you the second time?

A. Yes, sir.

Q. You shot at him twice first?

A. Yes, sir.

Q. And then the horse came at you again, and your horse started and sort of dodged off. Did he have the knife when he came the second time?

A. Yes, sir.

Q. How did he have it, then?

A. He had it in his hand this way [indicating].

Q. As he came at you again your horse dodged off, and you shot at him then two or three times; you do not know which?

A. Yes, sir.

Q. How often did he cut at you with the knife?

A. He cut at me two or three times.

Q. Then, after cutting at you twice, you shot at him twice, and he was coming at you again when you shot these two or three times?

A. Yes, sir.

Q. He had turned his horse and was coming at you again?

A. Yes, sir.

Q. Did the knife make any mark on your clothes?

A. It cut my sleeve—kind of catched along there and cut sort of down that way [indicating].

Q. Did it strike the arm?

R. No, sir; it did not strike the arm.

Q. The knife caught in the sleeve of the coat this way, at the sleeve?

A. Yes, sir.

Q. How many places?

A. Twice; it cut right there, and he cut at me the second time, and cut me on the back here, like.

Q. You point to the left shoulder.

A. Yes, sir; it was right on the shoulder, kind of a little back there [indicating]. His horse would not ride right up to me; his horse

129 would shy off from me when he would come towards me.

Q. Your horse would shy, too, from his when he would ride up to you?

A. Yes, sir.

Q. What became of him after you shot at him these last two or three times?

A. After I shot at him the last time the horse ran with him down the road, I think; I don't know exactly, but I think 25 or 30 steps, and he fell off.

Q. Toward the Falls or toward your house?

A. Right down the road south from where we were.

Q. That would be toward the Falls, would it not?

A. Yes, sir; down the road; it goes south down there a piece and then makes a turn.

Q. And he fell off the horse?

A. Yes, sir.

Q. You stated you were eating dinner when he came to your house?

A. Yes, sir.

Q. What time in the day was it?

A. I guess it was about one o'clock, as near as I can recollect.

Q. After *you* fell from the horse what did you do?

A. I just turned right around and went back and went a trailway there was right across to the Falls, right straight to the Falls, and went there and told them what I had done.

Q. You turned around and went a trailway to the Falls, did you?

A. Yes, sir.

Q. Did you go home before you went to the falls or go right to the Falls?

A. I went right to the Falls.

Q. How far were you from the Falls at that time?

A. I guess it was about 2 miles and a half or three, somewheres along there.

Q. How far were you from your own house?

A. It was about 3, 4, or 500 yards, somewheres along there.

130 Q. Mr. Russel, the man who lived near where you killed Gentry, was living on your place?

A. Yes, sir.

Q. You killed him on your own place?

A. He lived right at the upper end of the field, and he lived right below me.

Q. It was on your tract of land, was it?

A. Yes, sir.

Q. And then instead of going home you went down to the Falls?

A. Yes, sir.

Q. Who did you see when you went to the Falls?

A. I went there and I saw Frank Fore, and I saw several others there.

Q. Did you have any conversation with anybody there?

A. None; only Frank Vore.

Q. You saw several people, but you did not have any conversation with anybody except Frank Vore?

A. No, sir.

Q. Where was Frank?

A. He was in the store.

Q. Whose store?

A. In Blackstone's store.

Q. Did you have a brother or any relatives employed in that store?
A. I had a brother and cousin that was clerking in the store.
Q. Who were they?
A. There was Rocky Smith and Ned Smith.
Q. Rocky Smith was your brother?
A. Yes, sir; my half brother.
Q. Did you see him?
A. I saw him; he was in the store.
Q. Did you talk any with him?
A. No, sir.
Q. How old a man was Rocky at that time?
A. He was about 40 years old at that time.
Q. He was a grown man?
A. Yes, sir; he was an older man than I was.
Q. What became of him?
A. He is dead.
Q. Did you have any conversation at all with him?
A. No, sir.
131 Q. Now, you had a cousin there; who was it?
A. Ned Smith.
Q. Did you have any conversation with him?
A. I don't think I did.
Q. Did you buy anything at the store?
A. Yes, sir; I bought a box of cartridges.
Q. Who did you get them from; do you remember?
A. I don't recollect whether I got them from Ned or Frank. They were both standing there; I was standing there talking to Frank, and I just said, "I want a box of cartridges." I don't know whether Frank or Ned furnished them.
Q. You say Frank Vore is the only man you had any conversation with; did you tell him about what had taken place between you and Gentry?
A. Yes, sir.
Q. Where was it you told him?
A. Right at the corner of the porch.
Q. Outside of the house?
A. Yes, sir.
Q. Was that after or before you had bought the cartridges?
A. It was before, I believe—no, it was afterwards.
Q. He came out of the store?
A. Yes, sir.
Q. And it was out there you told him what had taken place between you and Jim Gentry?
A. Yes, sir.
Q. What did you tell him, now?
A. I just told him that Jim was trying to kill me, that I was trying to defend myself, and I told him I had a right to defend myself.
Q. You told him he was trying to kill you and you had killed him?
A. Yes, sir.
Q. Did you tell him how he was trying to kill you?
A. Yes, sir; I told him that he was cutting at me with a knife.
132 Q. Did you give him any directions, or make any requests of him, about seeing to him?

A. Yes, sir; I told him where he was, and I told him somebody had better go to see about him.

Q. Where did you go then?

A. I went out to Mrs. Vore's.

Q. That is, to Frank's mother?

A. Yes, sir.

Q. Who did you see there?

A. I saw Irvin Vore there, and I saw his sister there.

Q. Did you have any conversation with Irvin Vore?

A. Yes, sir.

Q. You had seen Frank first; Frank is the first person you say you saw; did you talk to Irvin about it?

A. I told him what I had done, and I told that I had to do it. I told him that I wanted to see George Spaniard, and I told him to go down there, to go on up home and tell my wife that I would be home in a day or two.

Q. You gave Irvin Vore an account of it, did you?

A. Yes, sir.

Q. Who else do you remember to have seen that day?

A. I saw Bob Hanks. Irvin's sister was there when I was there.

Q. Where did you go to from there?

A. I went down to Tom Grave's.

Q. Where did he live?

A. Down on the Canadian?

Q. Where did you go the next day?

A. I staid there all day at Tom's, all the next day.

Q. Did you go to Mrs. Starr's when you were there?

A. Yes, sir; it was the second day I think when I went there.

Q. The second day you went there; the first day you stopped at Grave's and the second day you went to Fannie Starr's did you?

A. Yes, sir.

Q. What conversation did you have with her?

133 A. I just told her I had got into trouble with Gentry down there.

Q. Tell all you told her now?

A. That is just about what I told her. I told her that I had killed him; that he was cutting at me with a knife.

Q. You told her that, did you—that you 'ad to kill him; that he was cutting at you with a knife?

A. Yes, sir.

Q. At the time you killed him did he have a quirt on his wrist or in his hand?

A. Yes, sir.

Q. He was not striking at you with a quirt at the time, was he?

A. No, sir.

The COURT. Just ask him what he was doing. Do not lead the witness.

Mr. CRAVENS (of counsel for defense). I will ask you if, on speaking of this difficulty, you mention' a quirt to these people—about his having a quirt?

A. Yes, sir.

Q. What did you tell them in ref'rence to the quirt? Do you remember? I mean Frank Fore, Irvin Vore, Fannie Starr, and anybody you talked to.

The COURT. He can not state anything else he said to anybody, except these conversations which were called out by the Government.

Mr. CRAVENS (of counsel for defendant). What did you state to Irvin and Frank Vore and Fannie Starr in reference to the quirt, if anything?

A. I don't know that I mentioned it. I just said Gentry was cutting at me with a knife, and I told Frank that I thought at first, when he first struck at me, that it was a quirt; that after he struck at me I saw it was a knife.

Q. You told him when he first 'truck at you you thought it was a quirt, but afterwards you saw that he had a knife?

A. Yes, sir.

134 Q. When he first struck at you did you think it was with a quirt, the first lick he made?

A. I did not expect him to run up on me there and try to kill me right there. When the horse kind of dodged off, when he struck at me and I knocked the lick off, I saw the knife, after he made the lick.

Q. But you saw the quirt first?

A. Yes, sir.

Q. Y'u knew that he had a quirt on his arm?

A. Yes, sir.

Q. You did not see the knife until you had knocked the lick off?

A. No, sir.

Q. Did you leave the country shortly after this?

A. I can tell you just about when it was if you will give me a little time. I think it was the 11th day of November I went off and went to Texas. I staid right around home until the 11th day of November and I left and went to Texas.

Q. This was sometime in August that the killing took place?

A. Yes, sir.

Q. The Thursday after the election?

A. Yes, sir. And I staid there until the 11th day of November, and I left there and went to Texas.

Q. Where were you from the time that Gentry was killed until the 11th day of November?

A. I was right around there in the neighborhood the most of the time.

Q. When you left, the 11th of November, give an account of it.

I went down in Texas there. Went to southern Texas and staid there until the next October, and came home.

Q. Then what?

A. I came on home, and I was in bad health, and some of them advised me to go off again and I went to southern California. I went out there because I was in bad health. I staid there at home from October

135 until in February, and I left there in February and went to southern California, and staid there until the next November.

Q You came home in October and staid until February?

A. Yes, sir.

Q. And went to southern California, and returned in November?

A. Yes, sir.

Q. You returned from Texas in October, 1884?
A. Yes, sir.
Q. And you returned from California in November, 1885?
A. Yes, sir.
Q. Where have you been since that time?
A. I have been right there at home all the time ever since then.
Q. What have you been doing?
A. I have been attending to my places there. I logged a good while, running log teams there; walnut logs. About a year of this time I reckon that I was working in the logging business.
Q. What else besides the logging business?
A. Attending to my farm, and looking after stock I had around there.
Q. Did you have a gun at any time?
A. About two years ago now we bought a gin there, and I worked at that; I think it was along in April we bought a gin, put it up there, in March or April, when we commenced to work at the gin. We put it up there and I attended to that.
Q. How long ago was that?
A. That was two years ago this past March or April.
Q. After you got the gin up who attended it?
A. I was there the biggest part of the time myself attending to it.
Q. Did you stay at home up there, and go about the country; what did you do?
136 A. I staid at home the biggest part of the time, only when I was busy at something else. I would go everywhere I pleased. I went everywhere I had business to take me.
Q. I will ask you if during that time you were with any deputy marshals?
A. Yes, sir.
Q. What ones?
A. I could not name them all; I met a good many. I had one or two there employed there working for me.
Q. Who was that?
A. A fellow named Ed Fears. He worked there for me. He was a renter on the place and I hired him and he worked there hauling mill timbers for me.
Q. Do you know Heck Thomas?
A. Yes, sir.
Q. Did you ever meet with him?
A. Yes, sir; I didn't meet him; I see him.
Q. Where did you see him?
A. I saw him here once in Fort Smith, and I saw him once there at home.
Q. Do you know Bud Weldon?
A. Yes, sir.
Q. He is the editor of the Fort Smith Elevator?
A. Yes, sir.
Q. Did you ever meet with him there at the Falls?
A. Yes, sir; I have seen him at the Falls three or four times.
Q. Did you have any conversation with him?

A. He wanted me to subscribe for the Elevator, and I told him I didn't know that I wanted to subscribe for it.

The DISTRICT ATTORNEY. That is not competent.

The COURT. No.

Mr. CRAVENS (of counsel for defendant). I am not insisting that *the* proves anything that he wanted him to subscribe for the Elevator.

The DISTRICT ATTORNEY. Or the fact that he had any conversation with him does not prove anything; Bud Weldon was not a dep-
137 uty marshal.

Mr. CRAVENS (of counsel for defendant). He is a citizen, though. I want to show that the defendant was seen up there and known to be there.

(To witness.) Have you been out of the country since you returned to it in 1885? You came back from California in the fall of 1885; have you been around the Falls ever since that time?

A. Yes, sir; this is the furthest I have been from home since that time, here in Fort Smith.

Q. How many times have you been in Fort Smith since that time?

A. Twice. I was selling logs to Wybark, and I came here to settle with him; made two settlements with him.

Q. Mr. Wybark is running a mill here?

A. Yes, sir.

Q. At the time you killed Gentry you had a pistol; why were you carrying a pistol?

A. I was a policeman.

Q. United States Indian policeman?

A. Yes, sir.

Q. Had you prior to that time held any other office?

A. I was a deputy sheriff there for two years before that.

Q. Deputy sheriff of that district?

A. Yes, sir.

Q. Of the Canadian district, and for two years?

A. Yes, sir.

Q. How long had you been Indian policeman?

A. About 2 or 3 months; I don't recollect just how long; some two or three months though.

Q. Which side of the Arkansas River did you live on at the time Gentry was killed?

A. I lived on the west side.

Q. What district did you live in?

A. Canadian district.

Q. This killing was in the Canadian district?

A. Yes, sir.

Q. On the southwest side of the Arkansas River?

A. Yes, sir.

138 Q. Was Gentry a white man or an Indian?

A. He was an Indian; is what he told me when he came there.

Q. What nation?

A. Cherokee.

Q. When you went down there to where the difficulty finally took place you told him you were going home if that was what he was going to do; what did he say to that?

A. He said that I had to go on to the Falls with him. I told him that I would not go on if that was what he wanted to get me off down there, to fuss with, I wouldn't go.

Cross-examination by the DISTRICT ATTORNEY:

Q. You say Gentry was an Indian?

A. That is what he claimed to.

Q. He claimed to be a Cherokee?

A. No, sir.

Q. You were a Cherokee were you not?

A. Yes, sir.

Q. How old was Gentry?

A. I guess he was somewheres about between 25 and 30, I don't know exactly. I never heard him say.

Q. How long did you know him down on the Canadian before he came over to where you were and worked for you?

A. I had seen him down there along the rethrough the winter; I guess it had been a month or such a matter before he commenced to work for me probably.

Q. He commenced to work for you in April?

A. He was down there a month or two before that, the first time I seen him down there.

Q. You say you saw him in the winter; when was that?

A. That was in the winter; I said a month or two, and that would be along sometime in February, or along there; I don't know just exactly.

139 Q. If he was an Indian, a Cherokee, and you were a Cherokee, you would be tried by the Cherokee authorities for killing him, wouldn't you?

A. Yes, sir.

Mr. CRAVENS (of counsel for defense). That is a question of law.

The DISTRICT ATTORNEY (to witness). You understood that, didn't you?

A. Yes, sir.

Q. You had been deputy sheriff up there?

A. Yes, sir.

Q. And you knew that the home courts had jurisdiction there of cases where one Cherokee killed another?

A. Yes, sir.

Q. And that this court did not have that jurisdiction?

A. Yes, sir; they wouldn't have anything to do with it up there.

Q. You gave them plenty of time, didn't you?

A. Yes, sir; they wouldn't have anything to do with it at all until they seen whether they had jurisdiction here or there.

Q. You gave them ten years time on that?

A. Yes, sir; it has been ten years since I done it.

Q. Have you ever been arrested up there?

A. No, sir.

Q. Have you ever been indicted up there?

A. No, sir.

Q. You were on the scout, were you not?

A. I was for awhile; and then I came home there, and was there attending to my business, the same as any other farmer would.

Q. How long were you on the scout?

A. I reckon you call it "scouting;" I was gone.

Q. You know what you were doing. How long were you dodging the marshals?

A. I didn't dodge them any after I came back. Whenever they came there I was around there where they were around in the neighborhood.

Q. Were you about where the marshals could see you?

140 A. It seems that way.

Q. Did they see you?

A. Yes, sir.

Q. I understand from you for a few months you kept out of their way and then after that you never made any attempt to keep out of the way of the marshals at all?

A. After I came back from California, Heck Thomas came over to my house once, and he rode up to the gate and I went out of the back door and went out into the field.

Q. What did you go out in the field for?

A. I thought maybe he was after me; I didn't know.

Q. You didn't want him to catch you?

A. No, sir.

Q. And you escaped him?

A. Yes, sir.

Q. And you tried to keep out of the way of any marshal that you thought had a writ for you, didn't you?

A. Yes, sir.

Q. I will ask you if you had not arranged at one time to come down here, and found out that a writ was out for you and you declined to go and went away?

A. I don't understand your question.

Q. Didn't you hear at one time up there that this writ had been recalled; that there was no writ out for you down here——

A. I heard they didn't have any writ for me.

Q. And then after that you heard they did have a writ for you, didn't you?

A. No, sir; not until after they came after me.

Q. When did they come after you?

A. They came in January.

Q. Where were you at that time?

A. I was at home.

Q. Who arrested you?

A. There was several of them; I could not name all of them; I don't know the names of all of them.

Q. They surrounded the house, didn't they?

141 A. No, sir; they come running across a field there and I went out of the back door out in the field, and they hollered at me to stop and I stopped.

Q. You were trying to make your escape then, were you not?

A. Yes, sir.

Q. Now, you talk about staying around there at home; that is about as sare a place to be as any other around there as a man wants when he wants to dodge the marshals, is it not?

A. I expect it is.

Q. That is about the safest place for him to be. You state you were an Indian policeman at that time?

A. Yes, sir.

Q. Did you carry a pistol all the time?

A. Yes, sir.

Q. What kind of a pistol was that?

A. It was a Colt's.

Q. What number?

A. 45.

Q. That is the largest size, is it not?

A. Yes, sir.

Q. How did you carry it?

A. I carried it in a scabbard.

Q. What kind of a belt did you have?

A. I just had one of these cartridge belts that they use all the time.

Q. Gentry knew when you left home that day that you were armed, did he not?

A. I guess he did.

Q. What kind of a coat did you have on?

A. I had on a kind of brown-looking coat.

Q. A sack coat?

A. Yes, sir.

Q. I want you to show me where he cut you?

A. Right in the sleeve, right up here, and then right across the shoulder here.

Q. Didn't cut you across here, then [indicating further down]?

A. No, sir; it catched in the coat here and down that way.

Q. How many cuts were there?

A. One right here and one right here [indicating].

Q. Where was the other cut?

142 A. There wasn't any other one. This was a separate cut here, and this was a separate one here.

Q. When he cut at you, you throwed up your left arm to ward off the lick, did you?

A. Yes, sir.

Q. Which way were you going at that time when this difficulty began?

A. We were going nearly south.

Q. You were going towards Webbers Falls?

A. Yes, sir; not exactly towards Webbers Falls; the road runs south down that way about a mile, and then turns kind of east towards the Falls.

Q. You were both on horseback?

A. Yes, sir.

Q. I understand you to say when you got down near to old man Russel's you stopped and told Gentry if he was going to Webbers Falls to have a difficulty with you you were going to stop and would go home.

A. Yes, sir.

Q. When you stopped he rode on a little?

A. Yes, sir; he rode on about 8 or 10 feet and turned his horse around facing me.

Q. When was it that he drew his knife?

A. I didn't see him when he drew his knife out.

Q. When he turned around facing you, then what occurred?

A. He told me that I must go to the Falls. I told him that I wouldn't, and he said I had to go.

Q. Then what occurred?

A. He run at me with a knife.

Q. Spurred his horse up, did he?

A. Yes, sir.

Q. Run at you with a knife?

A. Yes, sir.

Q. What hand did he have his knife in?

A. Right hand.

Q. What side did he come up on you?

A. On the left.

Q. While you were facing that way and he this way he dashed his horse up this way at you on this side of you, and passed you this way?

143 A. Like if you were riding there, and he came up on this side, on the left side.

Q. That is your left side over there [indicating]?

A. Yes, sir.

Q. He dashed up to you on the left side, on this side here?

A. On the left side.

Q. That is your left side, is it not?

A. Yes, sir; and my face was down this way.

Q. Say I am Gentry, and you were sitting that way, and this is south, and of course his horse's head faced you, and when he cut at you he run up on your left side?

A. Yes, sir.

Q. Had the horse got even with you when he begin cutting, or when did he begin cutting? When was it that he made the first lick at you? when he first got even with you?

A. Yes, sir; he was right up pretty near even with me when he cut at me.

Q. When did you draw your pistol?

A. After he made his first lick.

Q. You did not draw your pistol until after he made the first lick?

A. No, sir; it was done so quick that I could not; he rushed up before I thought.

Q. How many licks did he make at you with his knife on that charge?

A. He made one lick.

Q. Then did his horse dash on by you?

A. His horse wheeled when he struck over that way with the knife—the horse kind of turned from me, out that way, a little off to one side.

Q. Off to the left?

A. Yes, sir.

Q. To your left?

A. Yes, sir.
Q. What did he do then?
A. He wheeled the horse and came back at me again.
Q. When he wheeled his horse was his horse even to you again?
144 A. His horse was right pretty near to my side.
Q. Was the head of the horse to your side or facing you?
A. It was right straight off, like I was standing here, and he was right out there that way from me, and he came running right up to my side.
Q Came running with his head right to the side of your horse?
A. Yes, sir.
Q. Did he cut at you then?
A. Yes, sir.
Q. When was it you shot him?
A. I shot him when he came the first time; or the second time it was.
Q. If you were sitting on your horse here he was coming at you from that direction?
A. Yes, sir.
Q. And you wheeled the horse just as he was coming at you?
A. Yes, sir.
Q. When was it that he cut you then, or did he cut you?
A. He cut at me; his horse ran up to me and he cut at me, and he was right up to me.
Q. That was after you shot at him?
A. I shot at him twice.
Q. You shot at him twice?
A. Yes, sir.
Q. Did you hit him?
A. I don't know whether I hit him or not; I reckon I did.
Q. After you shot twice he still kept coming and cutting at you?
A. Yes, sir; he wheeled his horse and came again.
Q. The first time he dashed at you he cut at you, and you did not shoot?
A. No, sir.
Q. Then his horse wheeled off and he came at you the second time, and as he was coming you fired?
A. Yes, sir.
A. And he still kept coming and cutting at you?
A. Yes, sir.
145 Q. Then what did he do?
A. When he came at me his horse kind of wheeled when I shot, and then I stopped shooting; never shot any more; and he wheeled his horse and started at me again——
Q. Coming at you from the same direction?
A. Yes, sir; his horse just wheeled around and he came at me then.
Q. The third time?
A. Yes, sir.
Q. With his knife in his hand?
A. Yes, sir.
Q. Did he cut you with it?
A. No, sir; he hadn't got to me then.
Q. How close was he to you?
A. I reckon—he was right at me.

Q. Then you shot him twice?

A. I don't know. I don't know whether I shot him twice or three times then. I would not say positively whether it was twice or three times.

Q. Did you shoot quick?

A. Yes, sir.

Q. What part of his body did you shoot at?

A. I was shooting at his breast here.

Q. What part of the body were you shooting at the first time?

A. I was shooting at his breast all the time.

Q. When he came at you, of course, cutting at you with the knife, he had to cut over this way, did he not; over his arm?

A. Yes, sir.

Q. He had his bridle in his left hand with his horse?

A. Yes, sir.

Q. When he cut at you he cut this way [indicating]?

A. He cut right this way.

Q. He had to cut over his left arm, did he not?

A. I guess he did, or over the bridle. He cut over this way [indicating].

146 Q. When he came at you with his horse's head to the side of your horse, did he reach over his horse's head that way to cut at you?

A. Yes, sir.

Q. When was it that he cut you there in the elbow—cut your coat sleeve there?

A. He cut me there the first time.

Q. When was it that he cut you up here.

A. I think it was the second time.

Q. After you had shot at him twice?

A. Yes, sir.

Q. And his horse had wheeled off, and he came back, and he cut at you the second time—cut you up there?

A. Yes, sir.

Q. And then the third time he came at you the same way that he did the second time and cut at you over his horse's head?

A. Yes, sir; cut over his horse's neck.

Q. What size knife was that he had?

A. I could not tell you what size knife he had; it was a pretty good size knife.

Q. Did he have spurs on?

A. I don't recollect whether he did or not.

Q. He had a quirt on his arm here, did he?

A. I don't know whether he did at the time or not; I couldn't say whether he had on his right arm or not.

Q. You stated a moment ago that he had a quirt on his arm.

A. I said he had a quirt; I did not see where he had it.

Q. He could not have had a quirt and a knife both in his hand at the same time, could he?

A. Yes, sir; he could.

Q. And use the knife?

A. He could have a quirt hanging to his wrist.

Q. There is where the quirt was, was it not?

A. I don't know whether it was on his wrist or not; I don't know.

147 Q. You don't know whether it was on his wrist or in his hand?

A. I never saw it in his hand.

Q. Did you state a moment ago that you did not know whether the quirt was on his wrist or not?

A. I didn't.

Q. It must have been in his hand if it was not on his wrist?

A. He may have had it in his left hand, on his left wrist.

Q. Why is it, if he had the quirt on his left wrist, you thought that he was striking at you with the quirt the first time?

A. When we come riding down the road he had hold of the middle part of the quirt.

Q. In what hand?

A. In his right hand.

Q. When did he change it?

A. I never seen him change it, or whether he changed it or not.

Q. He had the quirt by the middle as you came riding on down; he did not have it upon his wrist, then?

A. It was along the part that went around the wrist; it was hanging down about that far. It is made with a loop in it.

Q. Well, did he have it around his wrist?

A. I could not say whether he did or not; he had hold of it.

Q. What was it made you think that he struck at you with the quirt the first time?

A. I never noticed him; he run up on me so quick.

Q. You said you thought he struck at you with the quirt the first time until you saw the knife; now what was it made you think that?

A. He had it in there, and we were talking coming down the road.

Q. He had it in his hand?

A. Yes, sir.

148 Q. Then you did see the quirt raised when he run at you, did you not?

A. I don't know whether I did or not; we were scuffling—I was trying to keep him from getting hold of me.

Q. Was he trying to get hold of you?

A. He run up to me, and I thought he tried to catch me.

Q. Didn't you say awhile ago that when he run at you first you thought he was trying to hit you with the quirt?

A. I said I thought maybe it was the quirt that he struck at me with until he struck, and I saw the knife.

Q. What was it; what made you think it was the quirt that he was going to strike at you with?

A. He had the *w*uirt in his hand before that.

Q. If he had a quirt and you thought that he was going to strike at you with the quirt, what was it made you think that he was going to grab at you?

A. I said I didn't know what he was going to do when he run up on me the first time until I seen the knife.

Q. Didn't you tell Fannie Starr that he struck at you with a quirt, and that that was the reason you killed him?

A. No, sir; I didn't.

Q. Didn't you tell the same thing to McDaniel—you know McDaniel, don't you—old man McDaniels?

A. Yes, sir.

Q. Didn't you tell old man McDaniels that he struck at you with a quirt?

A. I don't know whether I told McDaniels anything about it.

Q. You ought to know; you either killed a man for cutting at you, or striking at you with a quirt; certainly you ought to know which it was. You certainly would not tell McDaniels that if
149 it was not true?

A. I don't know that I saw McDaniels after it occurred for sometime.

Q. Will you say that you did not tell McDaniels that he struck at you with a quirt, and that that was the reason you had to kill him?

A. I don't recol'ect that I told McDaniels anything about it, whether I did or not.

Q. Well, if you did tell him anything about it did you tell him that?

A. Tell him that I killed him because he struck at me with a quirt?

Q. Yes, sir?

A. If I told him I told him that he struck at me with a knife.

Q. You didn't tell him that he struck at you with a quirt?

A. No, sir.

Q. He did not, did he?

A. I thought when he made the first lick that——

Q. Why did you think so?

A. I thought he had a quirt—he had it when I noticed it on.

Q. When a man is standing right in front of you telling you you have to go with him, you see him raise his hand, can you not tell whether it is quirt or a knife he has?

A. He did not raise his hand; he had it down.

Q. You were watching him, were you not?

A. Yes, sir.

Q. When he raised his hand up you could tell whether it had a quirt or a knife, a club or a gun in it that he was going to use on you?

A. I did not see his hand until he made the lick.

Q. Then what made you think it was a quirt?

A. Because he had the quirt in his hand.

Q. You say you did not tell McDaniels that he struck at you with a quirt?

A. I don't think I did.

150 Q. You didn't tell Fannie Starr that he did?

A. No, sir.

Q. You did not tell Irvin Vore that he struck at you with a quirt?

A. No, sir; I told Frank I thought that he struck at me with a quirt the first lick until he struck the lick and then I saw the knife.

Q. You didn't tell Frank Vore that he struck at you with a quirt the first time, and then afterwards with a knife?

A. I never told him anything about it, only I told him——

Q. Did you tell him how you killed the man?

A. I told Frank; I thought you said "Fannie" when you said "Frank."

Q. You told Frank that you thought he struck at you first with a quirt?

A. Yes, sir; I thought he did until I saw the knife, and when I saw the knife——

Q. You never told Fannie Starr anything about seeing the quirt and you just told her you had killed him?

A. Yes, sir; that is all.

Q. How long did you stay there?

A. I got there about noon and I staid there until the next morning.

Q. You simply told Fannie Starr you had killed Gentry?

A. I told her that I had killed him; that he had tried to kill me.

Q. You didn't tell her how it happened?

A. No, sir.

Q. Did she not ask you how it happened?

A. No, sir.

Q. She didn't ask you any questions about it?

A. No, sir.

Q. Who else was there?

A. Shortly afterwards Forst came.

Q. Who is that?

A. Her husband.

Q. Didn't you tell him how it happened?

A. No, sir.

Q. Did he not ask you how it happened?

A. No, sir; he never asked me any questions at all.

Q. Never asked you any questions at all about the matter one way or the other?

A. No, sir.

151 Q. Or Fannie Starr never asked you any questions?

A. No, sir.

Q. Did you tell Fannie Starr they had found a knife there?

No, sir; I did not.

Q. When did you first hear about their finding a knife there?

A. It was four or five days afterwards.

Q. Who told you about it?

A. I don't recollect just who told me.

Q. How many times did you hit that man?

A. I don't know, sir.

Q. How many times do you think you hit him?

A. I don't know; I tried to hit him every time I shot, I guess.

Q. How many times did you shoot at him?

A. I can not say whether it was four or five times.

Q. How many balls did that pistol carry?

A. Six.

Q. You could tell how many shells you emptied?

A. I think there was one unloaded cartrid'e.

Q. Then you shot at him five times?

A. I don't recollect whether it w's loaded all around or not; sometimes I carried it with one empty chamber.

Q. Did you look to see whether you had killed him or not?

A. I saw him fall.

Q. Did you go back to see whether he was dead or not?
A. No, sir.
Q. You were pretty well satisfied you had killed him, were you not?
A. Yes, sir.
Q. How far was that from old man Russel's?
A. It was, I reckon, about 100 yards; somewheres along there; 100 or 150 yards.
Q. Was it in sight of old man Russel's?
A. Yes, sir.
Q. Why didn't you go down and tell them what you had done?
152 A. I just turned and went right straight on to the Falls.
Q. Why didn't you go down to old man Russel's and tell him you had shot a man up there and get him to go and see about it?
A. I don't know; I just went right straight on to the Falls.
Q. You could have gone down to old man Russel's without any trouble, couldn't you?
A. Yes, sir.
Q. There were other neighbors around you could have found?
A. Yes, sir.
Q. They could have gone there and seen what the situation was and found that knife, too, couldn't they?
A. I reckon they could if they had looked for it.
Q. You didn't see any of them; you went right on to the Falls and got some more cartridges and filled your pistol. You got some more cartridges at Blackstone's, and then went to your aunt's Mrs. Vore's?
A. Yes, sir.
Q. Did you make any further inquiries about it that day?
A. No, sir.
Q. Had you ever been arrested before up there?
A. Yes, sir; well, I was not arrested; I gave up once.
Q. What was that for?
A. It was for this same thing.
Q. To whom did you give up?
A. I gave up to a fellow named Lee.
Q. Who was Lee?
A. He was a marshal.
Q. From what court?
A. From this court.
Q. Why didn't you come on down with him?
A. Well, there were some men promised to go on bond, if they would allow me bond, after I gave up to him, and they wouldn't go after I gave up.
Q. What did you do?
A. I just rode off.
Q. Were you ever arrested before charged with any offense?
153 A. No, sir.
Q. What position was this man in when you fired the first shot; was he facing you?
A. He was coming right facing me.
Q. Right straight at you?

A. He was coming a little to my left.

Q. Like you were facing this way, he was coming from that direction?

A. Yes, sir.

Q. You wheeled in your saddle and shot, and shot at his breast, you say?

A. Yes, sir.

Q. Did his horse run up against yours, or did yours dodge out of the way?

A. He run right up by the side of mine; his horse's shoulders was to mine's shoulders.

Q. Then is when he cut at you the first time?

A. Yes, sir.

Q. You say you didn't shoot at him until after he had cut at you once; you didn't shoot at him at all until after he cut at you the first time?

A. He made his lick the first time, and I jerked me horse back, kind of wheeled as he made the lick, and I—

Q. And you fired?

A. I fired when he jerked his horse around, and I jerked my horse around; I got my pistol by the time he got around, and then I shot.

Q. When he came back the second time his horse's head was right to your side?

A. No, sir; kind of a little quartering, right up against me.

Q. He was facing you then, was he?

A. Yes, sir.

Q. If you hit him you hit him somewheres in front?

A. It may have been a little to his left.

Q. He was on your left side coming at you in that direction; how could you shoot him in the left side?

154 A. His left side was next to me.

Q. He was on your left; his left side could not be next to you.

A. When we were facing one another both of our left sides would be together.

Q. When he was coming at you from this direction; that is when you shot at him, was it not; he came facing you each time, did he?

A. A little right, quartering up to me.

Redirect examination by Mr. WM. M. CRAVENS:

Q. His horse would come up to you, and this striking would take place, and he would whirl and come back again?

A. Yes, sir; every time he would make a lick I would jerk my horse back.

Recross-examination by the DISTRICT ATTORNEY:

Q. That was an ordinary pocket knife he was using?

A. Yes, sir; it looked like an ordinary pocket knife.

Q. I believe you stated a moment ago that as soon as you left your gate when you first started to Webbers Falls that this man began to quarrel with you and curse you?

A. Yes, sir; about the time we struck the road that came down out of the gate.

Q. What was it he said to you then?

A. He commenced cussing me about the horse as we went on down the road.

Q. Why didn't you turn around then and go back?

A. I did not think he would want to hurt me any way; I just
155 thought maybe I could talk him out of it.

Q. You didn't want to ride along with a man that was cursing you, did you?

A. I would go along with anybody that I thought I can reason with them.

Q. Why was it you determined to turn back when you did turn back?

A. He told me that me or him—one had to die that day before night.

Q. When did he tell you that?

A. He told me that right when we stopped there; just before the time that we stopped. We was not quite stopped. He rode on a little piece after he told me that and then did stop.

Q. He wanted you to go to Webbers Falls, did he not?

A. Yes, sir.

Q. What was his idea of getting you to Webbers Falls?

A. I don't know, unless it was to get something to hurt me with. When we first started he started down there to get Blackstone to go his security. After I found out that he wanted to fuss with me I thought maybe that he wanted to get me down there to get something to hurt me with.

Q. You knew he was not armed then, didn't you?

A. I didn't know it.

Q. Was he not in his shirt sleeves?

A. He had on a vest, I think.

Q. He had nothing else on, had he?

A. I don't think he had.

Q. You saw no pistols about him or guns?

A. No, sir.

156 Redirect examination by Mr. W. M. CRAVENS:

Q. How far is it from where you rode out of the gate down to the road at your house?

A. I suppose it was fifteen or twenty steps to where the road come along.

Q. When was it you surrendered to that deputy, Lee; do you recollect?

A. I think it was sometime along that winter after I come back from California, if I am not mistaken.

Q. That would be in the winter of 1885 and '6?

A. Yes, sir.

Witness excused.

Here court took a recess until 1:30 o'clock p. m.

157 To further maintain the issues on his part the defendant introduced the following-named witnesses: J. S. Downer, Henry Owen, Robert Lackey, Edward Smith, Louis Crapo, Richard Scott, Timothy Fields, Richard Crosslin, Dr. W. W. Campbell, Edmond Fleetwood,

Robert Tiner, Mrs. Robert Vann, Robert Vann, J. W. Speck, Rese Hilderbrand, Irvin Vore (recalled), Frank Vore (recalled), J. H. Vestal (recalled), who testified as follows:

158 AFTERNOON SESSION, 2:00 o'clock.

J. S. DOWNER, having been duly sworn upon behalf of the defendant, was examined by Mr. Thomas H. Barnes, of counsel for defendant, and testified as follows, to wit:

Question. State your name, please.

Answer. J. S. Downer.

Q. Where is your residence?

A. Webbers Falls.

Q. How long have you resided there?

A. About 11 years—between 11 and 12 years.

Q. Do you know this defendant, Famous Smith?

A. Yes, sir.

Q. Were you there at the time a man named James Gentry was said to have been killed by the defendant near Webbers Falls?

A. Yes, sir.

Q. When was that?

A. In 1883, I believe.

Q. What were you doing at the Falls at that time; what was your business?

A. I was painting.

Q. You were a painter?

A. Yes, sir.

Q. By trade?

A. Yes, sir.

Q. You were engaged in that kind of business when this occurred?

A. Yes, sir.

Q. Are you a citizen of the Indian country?

A. No, sir.

Q. Where do you reside now?

A. Webbers Falls.

Q. If you saw the remains of Gentry on that day, just please tell us where you first saw them.

A. I saw them first in a wagon in front of Mr. Blackstone's store.

Q. What sort of a wagon?

A. It was a two-horse wagon.

159 Q. Then what was done with them after that?

A. They were taken from there across to a little barber shop across the street.

Q. About what time of day was that?

A. It was late in the evening.

Q. With reference to sundown, was it before or after or about the time; you say it was late in the evening?

A. I think it was close to sundown.

Q. When they were taken over to this place?

A. Yes, sir.

Q. What was done with these remains, and who handled them?

A. They were taken into a shop there, and the clothes taken off, and washed and dressed.

Q. What size shop was it?

A. Oh, it was about 10 x 12, I guess.

Q. Did you name whose shop it was?

A. Yes, sir; it was Scales's barber shop.

Q. Is Scales living or dead?

A. He is dead.

Q. He was a colored man, was he not, that run the shop there?

A. Yes, sir.

Q. What time did they commence to undress this man?

A. It was about nearly dark; about dusk.

Q. Who handled him now; tell us who was in ther' when they commenced to undress him?

A. Myself, Mr. Lackey, and Mack Scales.

Q. Were there other people in there when this undressing, and so forth, was going on?

A. If there was I do not remember it. There was several around on the outside.

Q. Why were they not allowed in the room?

A. After we got through dressing there it was very warm, and
160 we did not want nor need anybody else in there.

Q. Now, who handled that body; undressed it properly for the grave?

A. Mr. Lackey and myself.

Q. Anybody else?

A. Not that I remember of.

Q. You took all the clothing off that the man wore; you put other clothing on; where were they gotten?

A I don't know where they were got from. They were brought there by somebody; I don't know who.

Q. Now, commence and tell us the best you can—you say you and Mr. Lackey handled the remains. Now, where were the wounds, if there were wounds upon this man's body, located?

A. There was one in the shoulder, about there——

Q. Which shoulder is that?

A. It was the left shoulder.

Q. Where would you say it was on the left shoulder?

A. On the point of the left shoulder.

Q. On the outer part and near the point of the left shoulder?

A. Yes, sir.

Q. Do you know whether that ball went into the body?

A. No, si'; I could not say whether it did or not.

Q. You handled the body when you dressed it?

A. Yes, sir; I could not say whether it went in or not.

Q. If there was a ball entered the body from that point, then it went through that arm into the body under the arm, I suppose, or nearly so?

A. No, sir; it was right there in the shoulder.

Q. But then it was so high; you put your hand high enough that there would not be any space to amount to anything under the arm there—or how was that?

A. No, sir; I did not think it would go under that.

161 Q. If there were other wounds tell us where they were?

A. There was one in the neck.

Q. Show to the jury as near as you can where it was?

A. It was, I should judge, about here.

Q. You place your finger upon the left side of the neck, a little in front of the bone of the neck, as it is called?

A. It was just about here. Or it might have been an half an inch either way; it was about here as near as I can.

Q. That is near to where the neck joins the head?

A. Yes, sir; about here.

Q. Which way did it range; did it go out?

A. Yes, sir; it came out right on the opposite side, here, straight through.

Q. Which side did it appear to enter from, or do you remember about that?

A. Well, sir, I could not say which side.

Q. You do not remember about that?

A. No, sir.

Q. The wound you speak of here I believe you stated was in the left shoulder?

A. Yes, sir.

Q. Were there any other wounds upon this man?

A. Yes, sir.

Q. Where?

A. One through the breast.

Q. Put your finger on the place as near as your can?

A. In the middle, right here close.

Q. That would be a little to the left, lower than the breast bone, and a little to the left of the median line, is it not; that is, a line that would be drawn from the center of the body towards the feet—you put it a little to the left of that?

A. Yes, sir.

Q. And the lower part of the breast?

A. Yes, sir.

Q. How far to the left?

A. Well, about two inches, I guess.

162 Q. Do you know now which way that ball ranged, and whether it came out or not?

A. Yes, sir; it came out in the back.

Q. Whereabouts?

A. Not far from the backbone, kind of under the shoulder blade.

Q. Under the left shoulder blade?

A. Yes, sir.

Q. Came out in the back below the left shoulder blade, and not far from the backbone?

A. Yes, sir.

Q. You say then, if I understand you, that that ball entered from the front?

A. Yes, sir; went very nearly straight through.

Q. How did you know the ball entered from the front?

A. I don't know the shot entered from the front.

Q. Well, describe the appearance, if you can, of the holes.

A. The hole in the front was round, and the wound in the back was torn.

Q. Outward, or how?

A. Yes, sir.

Q. Of course you do not know of your own knowledge; I understand that, but according to that then what was the appearance? Did the ball appear to have entered from the behind from the way these holes were, or from the front?

A. I judged that it entered from the front.

Q. The hole in front was round and the hole in the rear was turned outward?

A. Yes, sir.

Q. Were there any other wounds that you remember upon his person?

A. No, sir; if there were I don't remember them.

Q. You handled him?

A. Yes, sir.

Q. And washed him?

A. Yes, sir.

Q. You undressed him and dressed him, did you?

A. Yes, sir.

Q. Now, was there any discharge from any of these wounds?

163 A. Yes, sir.

Q. Where?

A. From the back.

Q. Bloody?

A. Yes, sir.

Q. What did you do with the wounds, if anything?

A. Yes, sir; I went to Mr. McDaniel's and got a needle and thread and some cotton and stuffed it in and filled it up full with cotton and sewed it up.

Q. For what purpose?

A. To stop the blood.

Q. Before you put cotton in to stop it up did you put anything in there before that?

A. No, sir.

Q. That is, had you put the cotton in and tried it to see if it would stop it before you went and got a needle and thread to sew it up?

A. No, sir.

Q. How was that man laid out in the room, that is, which way was his head and which way his feet?

A. His head was towards the river; his feet to the southwest, you might say.

Q. Were his feet from the door or towards the door?

A. From the door, is the way his feet were.

Q. Which was his *his* head?

A. Towards the door.

Q. How near to the door was his head?

A. Oh, in two feet, I guess.

Q. How did you lay him out; on what?

A. On a plank.
Q. Was there any sign of powder burn on the wounds?
A. No, sir; if there was I didn't see any.
Q. You do not remember any?
A. No, sir.
Q. When you were handling him there was it by daylight or lamplight or candlelight or how?
A. By candel light.
Q. What sort of candels did you have?
A. I don't remember; I suppose they were tallow candels though.
164 Q. These candels they get at the stores?
A. Yes, sir.
Q. How many did you have?
A. I could not say; I don't think though—there might have been a couple, but I could not say how many.
Q. Did anybody hold a light there at any time?
A. Yes, sir.
Q. Who?
A. Mack Scales.
Q. Did anybody else hold a light?
A. I don't think there was.
Q. Did anybody else handle that body? Anybody undress it, wash and dress it, except you and Mr. Blackstone?
A. I don't remember of anybody touching the body except Mr. Lackey and myself and Mack Scales.
Q. That is after it was put in the room?
A. Yes, sir; if there were I don't remember of anybody else.

Cross-examination by the DISTRICT ATTORNEY:

Q. Who did you say was in the room?
A. Mack Scales, Bob Lackey, and myself.
Q. Anybody else?
A. I don't think there was.
Q. The door was open was it not?
A. Yes, sir.
Q. It was in the summer time?
A. Yes, sir.
Q. About what time was it when they brought him there?
A. Late in the evening, about dusk, I think.
Q. Anybody else come around?
A. Yes, sir.
Q. Who else come around?
A. Oh, I don't know; there was a good many; I could not say who they were, but there was a good many around on the outside.
165 Q. They wer' around the door?
A. Yes, sir; around the door and a window that was there.
Q. Where they could see in?
A. Yes, sir.
Q. You don't know whether they came in or not, do you?
A. I think I ought to know if they came in.
Q. You say now that nobody came in that room except you all?
A. I don't think ther' was a man in there except us.

Q. I don't want what you think, but what you remember.
A. To the best of my knowledge, there was no one else in the room.
Q. If there had been anyone else in there you would have known it?
A. I think I would.
Q. How many shots were in him?
A. Three.
Q. Only three?
A. I don't think there was any more; if there was I don't remember it.
A. Well, you dressed him?
A. Yes, sir.
Q. You ought to know?
A. I think I do.
Q. You say now there was but three shots?
A. Yes, sir.
Q. Nobody else had an opportunity to see them except you and Lackey and Scales?
A. Yes, sir; they did.
Q. How could they see them?
A. Through the window or through the door.
Q. Well, then, other persons did see them?
A. I suppose they did.
Q. How did you fix him when you sewed that hole up in the back; did you turn him over on his back?
A. On his left side.
Q. That is when you were sewing up that hole in his back?
A. Yes, sir.
Q. Was he undressed at that time?
166 A. Yes, sir; he was undressed when I sewed up that hole.
Q. Wasn't there some more shots in his back?
A. If there were I don't remember it.
Q. Who sewed up that hole?
A. I did.
Q. What time in the day was it when he was brought there?
A. Along about dusk.
Q. How was he dressed when he was brought there?
A. He had on every-day clothes.
Q. Did he have on a coat?
A. I won't be right positive; I think he did.
Q. You think he had on a coat?
A. I think he did.
Q. Did he have on a vest?
A. I don't think he did.
Q. What kind of a shirt?
A. I could not say as to that.
Q. What were you doing up there?
A. I was painting on a church.
Q. Were you raised there in that country?
A. No, sir.
Q. Where did you come from?
A. Wisconsin.
Q. To the Indian Territory?

A. No, sir; not directly.
Q. Where did you go from Wisconsin?
A. Missouri.
Q. Where from Missouri?
A. Kansas.
Q. From Kansas where?
A. To the Indian Territory.
Q. Have you ever been arrested up there or anywhere else?
A. No, sir.

Witness excused.

167 HENRY OWEN, having been duly sworn upon behalf of the defendant, was examined by Mr. Thomas H. Barnes, counsel for defendant, and testified as follows, to wit:

Question. What is your name?
Answer. Henry Owens.
Q. Where do you live?
A. Webbers Falls.
Q. Who do you live with?
A. McDaniels.
Q. This old man McDaniels who is here?
A. Yes, sir.
Q. How long have you lived with him?
A. About 15 years.
Q. What is your age?
A. 22 years old.
Q. Were you at Webbers Falls at the time that James Gentry was killed?
A. Yes, sir.
Q. How old were you then?
A. I was about 12.
Q. Were you there when the remains of Gentry were brought to Webbers Falls? At the time they were brought there and taken to Scales's shop?
A. I was ther', but I never seen him.
Q. Did you see them at all?
A. I seen him that night?
Q. What time?
A. About dark, or a little after.
Q. Where were you when you saw them?
A. I was there at the shop.
Q. Now, just begin there and tell us what you saw, and how you come to make your observations, who was handling the body, and all about it.
A. Mr. Downer and Bob Lackey was handling him when I seen him.
Q. Was there anybody else present with them?
A. There was a fellow named Mack Scales was holding the light.
Q. Did you go there to the shop—did you go inside?
168 A. I just went to the door; that was after dark, and Mr. Downer and Bob Lackey was handling the body.
Q. A colored man named Bob Scales was holding the light?
A. Yes, sir.

Q. What condition was the body in with reference to being dressed or undressed when you saw it?

A. His shirt was off, was about all.

Q. What position was the body in?

A. He was lying on one side, the left or right, I don't remember which now.

Q. Did you see any wounds on the body?

A. I seen three bullet holes, is all I can remember of seeing.

Q. Where were they?

A. One in here in the shoulder somewheres, one in the neck along here somewheres, and one down here in the breast somewheres; I don't know just where it was exactly.

Q. Did you see any holes that corresponded with this one down here anywhere, any other hole?

A. Yes, sir; I saw one that corresponded with this one here in front back behind here somewheres in the back.

Q. Were there any other holes in the back you saw except that one?

A. I don't remember of seeing any others.

Q. You saw a hole in front and one to correspond in the back, and one on the arm, and a hole in the neck?

A. Yes, sir.

Q. Do you know whether that hole you saw in the neck, whether it went through the neck or not?

A. No, sir; I don't know.

Q. You do not know about that?

A. No, sir.

Q. How long were you there about the door, or at the door?

A. About five minutes.

Q. You stood there and looked at them?

A. Yes, sir.

169 Q. You were there about that long?

A. Yes, sir.

Q. Cann you describe the appearance of the wound in front in the body—what sort of hole it was?

A. It was a round hole in front.

Q. How was this hole behind?

A. I could not tell; it was bloody back there.

Q. But the hole in front was a round hole?

A. Yes, sir.

Q. You say you were there about five minutes making these observations, Scales holding the light?

A. Yes, sir.

Q. Did you see anybody else there in that room except these men while these wounds were being dressed?

A. I don't remember of seeing any others.

Q. Were there other people about there in the yard?

A. Yes, sir; there was quite a crowd out in the yard.

Q. There was people out in the yard, but you didn't see anybody else in the house?

A. I don't remember of seeing anybody else.

Dcross-examination by the DISTRICT ATTORNEY:

Q. Are you an Indian?
A. Yes, sir.
Q. Are you any relation to the defendant?
A. No, sir.
Q. Your name is Henry Owens?
A. Yes, sir.
Q. You were 12 years old when this occurred?
A. Yes, sir; about that.
Q. When you came, how long had they been at work on him?
A. I don't know, sir.
170 Q. What were they doing to him?
A. They were just washing the blood off, is all.
Q. Did they turn him over?
A. No, sir; they did not turn him over while I was there.
Q. He was lying on his back, was he?
A. Yes, sir; sid-ways.
Q. Lying on his side?
A. Yes, sir.
Q. Which way was his head?
A. Towards the back of the house.
Q. His feet were towards the door?
A. Yes, sir.
Q. You are certain of that, are you?
A. Yes, sir; I guess so. That is what I think—I am not positive. I think that is the way 'is feet were.
Q. You are about as certain of that as you are of any other things you have been testifying about, are you not?
A. Yes, sir.
Q. Where was he shot?
A. He was sho' once in the breast here——
Q. That is the stomach where you have your finger.
A. Along about here [indicating].
Q. You put y'ur hand down on your stomach first; what did you do that for?
A. It was down here somewhere.
Q. Didn't you put your hand away down here first?
A. I had it right here.
Q. Now, where was he shot?
A. Right along here [indicating on breast]. I can not put it exactly where it was, but somewheres along here.
Q. Where was that shot in the shoulder?
A. Along about here [indicating on point of shoulder].
Q. Do you know whether that shot went through or not into his body, the one in the shoulder?
A. No, sir; I don't know.
Q. Did you see any shot in his neck?
171 A. Yes, sir; one in here somewhere.
Q. In front or at the side?
A. About along here [indicating on side and front].
Q. Did you see whether that shot came out or not?

A. No, sir; I did not notice.
Q. He was laying on his left side, was he?
A. Left or right, I don't remember which.
Q. His head was back towards the back part of the house and his feet out towards the door?
A. Yes, sir.
Q. And they were washing him when you saw him?
A. Yes, sir.
Q. Did they get through washing before you left?
A. No, sir.
Q. They were still washing when you left?
A. Yes, sir.
Q. You stood there looking at him for five minutes?
A. Yes, sir.
Q. And then you left?
A. Yes, sir.
Q. Did you see any other wounds about him?
A. Only in the back here is all the wounds I noticed.
Q. Where was that wound in the back?
A. Along about the back here somewheres, about opposite this breast wound here.
Q. Any others?
A. That is all I seen.
Q. Did you know Gentry?
A. Yes, sir; I knew him when I saw him.
Q. There were a great many other people around there, too, was there not, looking at it and examining it?
A. There was some out in the yard there.
Q. You said awhile ago there was a good many out in the yard.
A. Yes, sir; there was.
172 Q. They were looking in at the door and window?
A. Yes, sir.
Q. To see what was going on?
A. Yes, sir.
Q. What did they have, a lamp or candle?
A. I don't remember.
Q. You say that you think he had his clothes on, all except his shirt?
A. Yes, sir.

Redirect examination by Mr. THOMAS H. BARNES:

Q. That is, at the time you saw him?
A. Yes, sir.
Witness excused.

173 ROBERT LACKEY, having been duly sworn upon behalf of the defense, was examined by Mr. Thos. H. Barnes, and testified as follows, to wit:

Question. What is your name?
Answer. Robert Lackey.
Q. What is your age?
A. 46 past.
Q. You used to live here at Fort Smith?

A. Yes, sir.
Q. Where do you reside now?
A. Krebbs, Indian Territory, Choctaw Nation.
Q. Did you ever live at Webbers Falls?
A. Yes, sir.
Q. How long *afo*?
A. Well, I guess it is somewheres in the neighborho'd of about 6 years ago since I left there.
Q. Were you there at the time that James Gentry was killed?
A. Yes, sir.
Q. When was that?
A. It has been in the neighborhood of about 10 years ago—9 or 10 years ago.
Q. Did you see his remains there after he was killed?
A. Yes, sir.
Q. Where did you first see them?
A. Up at this old man's—I can't say his name now; on the lower end of Mr. Smith's place.
Q. Russel?
A. Yes, sir; Russel.
Q. You saw them there?
A. Yes, sir.
Q. Where did you see them next?
A. I saw him down at Webbers Falls.
Q. What time were his remains taken there?
A. As near as I can remember, it was between sundown and dark when he was fetched in there in a wagon.
Q. What was done with them?
174 A. He was put in Mack Scales' barber shop.
Q. If he was handled there, dressed for the grave, just begin and tell *is* all about what you had to do with it?
A. There was Downer and myself, Mack Scales was in there, and there was several wanted to come in the room, and we would not let them in; it was warm in there and sultry; and we washed and dressed him.
Q. Did you have the door and window open?
A. Yes, sir.
Q. How large a room was it?
A. It was about 6 x 8.
Q. You had the doors and windows open, but didn't let others in there on account of being so warm?
A. Yes, sir; we had a couple of boards in there and a box to lay them on and there wasn't room for more. The room was small.
Q. Who undressed him?
A. Downer and I.
Q. Did you have any lights?
A. Yes, sir.
Q. What lights did you have?
A. Cand*els*.
Q. How many, if you remember?
A. Two.
Q. Did anybody hold the light?

A. Yes, sir.
Q. Who?
A. Mack Scales.
Q. Anybody else that you remember?
A. No, sir; nobody in there but three of us.
Q. How many wounds were there? Just begin now and describe the wounds on the man.
A. There was three wounds; one went in the neck here.
Q. Did it go through the neck?
A. Yes, sir; it went through the neck. It came in about here [indicating].
Q. A little in front of this bone—a little in front of the center of the neck?
A. Yes, sir.
Q. Did you notice which side of the neck the ball entered?
175 A. No, sir; I didn't notice which side it entered in.
Q. Where was the wound in the shoulder or arm, wherever it was?
A. In the left shoulder, just along about here somewheres, right in front of the shoulder; went in here [indicating].
Q. In front of the outer part you put it on the shoulder?
A. Yes, sir.
Q. Where was the other wound?
A. The next shot was somewheres along in here [indicating in the breast]. It came out under the left shoulder blade on the left side of the backbone.
Q. Where did the ball enter?
A. In front here.
Q. How do you know?
A. I could tell by the way it cut; it cut smooth hole going in and tore as it came out.
Q. Were there any other wounds upon this man's body?
A. No, sir; I didn't see no others.
Q. You dressed him?
A. Yes, sir; I helped dress him, wash and dress him, stuff cotton there in that hole behind, and Downer sewed it up.
Q. Why did you do that?
A. To keep it from bleeding on his clothes.
Q. You have a distinct recollection as to these wounds?
A. Yes, sir.
Q. And they were as you have described them?
A. Yes, sir.
Q. Do you know whether this man Gentry was an Indian or a white man?
A. He always claimed to me that he was a Cherokee.
Q. What was his appearance as to complexion and hair?
A. He was dark complected, straight dark hair, and dark eyes.
Q. About what size was he?
A. Well, I would rather judge he was about 6 feet; somewheres
176 in that neighborhood; maybe he might have been a little over.
Q. About what was his weight?

A. I would take him to weigh from about 170 to 180 pounds.
Q. What was the size of this defendant at that time?
A. He was about the size of Mr. Smith, about as tall——
Q. I say, what was the size of Mr. Smith at that time?
A. He was very small and thin.
Q. What difference would you say there was in the weight of the two men at the time?
A. I don't know as I could tell for certain; it would be my judgment that there would be a right smart.
Q. The other man was considerably larger and heavier?
A. Yes, sir; a good deal larger.
Q. About what was his age, would you judge?
A. I don't know that I could say; he looked to me like he was about 25 or 30.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long had you known Gentry?
A. Five or six months.
Q. Where?
A. At Webbers Falls.
Q. He had been living there for five or six months, Gentry had?
A. Yes, sir.
Q. Was that the first place you knew him?
A. Yes, sir.
Q. Do you know where he had lived before he came to Webbers Falls?
A. No, sir; I do not.
Q. Were you intimately acquainted with him?
A. I was after he came there.
177 Q. Did he ever tell you where he came from?
A. No, sir.
Q. Never told you where he was raised?
A. No, sir.
Q. Didn't claim to have been raised there in the Territory?
A. He didn't say; he just claimed that he was a Cherokee.
Q. Do you know whether he was recognized as a Cherokee up there or not?
A. No, sir; I do not.
Q. Do you know whether he exercised any rights as a Cherokee citizen?
A. No, sir; not to my knowledge.
Q. Don't you know as a matter of fact that he did not recognize any rights of a Cherokee citizen?
A. No, sir; I do not.
Q. Who was it you say was with you when you dressed his wounds?
A. Downer and Mack Scales.
Q. What were you doing down there at old man Russel's?
A. Afte' I heard of the killing I got on my horse and went up there.
Q. Who was there at the time?
A. I don't know who was there. Felix Griffin and I went up there together from Webbers Falls.
Q. Who brought him down to Webbers Falls?

A. It was old man Russel's wagon; I don't know who was in the wagon; I don't recollect.

Q. Was he dressed when you first saw him?

A. He had on the clothes that he was killed in.

Q. What were they? What did they consist of?

A. I don't recollect.

Q. Did he have a coat on?

A. Yes, sir; I think he did.

Q. He had on a coat?

A. Yes, sir; I think he did.

Q. Did he have on a coat when he was brought to Webbers Falls?

A. I believe he had a vest; I could not say about the vest; I do not recollect.

178 Q. Now, you say you took him in and undressed him?

A. No, sir; I didn't take him in. Them fellows laid him down in the wagon ——

Q. You took charge of him then after he got there?

A. Frank Vore came to me; I was standing out there, and he asked me if I would come and help wash and dress the man, and I told him that I would.

Q. Who else was helping?

A. Downing and Mack Scales.

Q. What was the first thing that you did? Did you undress him?

A. Yes, sir.

Q. You took all of his clothes off of him?

A. Yes, sir.

Q. Laid him out?

A. Yes, sir; washed and dress him first.

Q. You took his clothes off before you washed him?

A. Yes, sir.

Q. The first thing you did was to wash him?

A. Yes, sir.

Q. Where was that wound in the neck?

A. It ranged in the neck here, in front of them two bones there.

Q. It went right straight through, did it?

A. Yes, sir; right straight through.

Q. Where was that wound in the shoulder?

A. Right in here som'where.

Q. Did it go in this way or from the side?

A. It went in this way.

Q. That would be right in towards his body?

A. Yes, sir.

Q. Did that ball come out?

A. No, sir; I didn't see where it came out at.

Q. Then that shot was in the neck, and that shot was evidently fired when he was standing with his side to the man that shot him?

A. I could not say; I wasn't there.

Q. If a man was standing in front he could not shoot and make

179 that kind of a hole in a man's body?

A. I don't know that he could.

Q. Don't you know that he could not? If he was standing in front of him how could he shoot him in the side and the ball range in that direction like that?

Mr. BARNES (of counsel for defendant). He can only tell the location and range.

The DISTRICT ATTORNEY. The ball in the shoulder was evidently shot from the side; it was not shot from the front?

A. I don't know; the ball ranged that way; it may have struck this bone here and ranged back in that way. I could not say whether the man was standing sideways that shot him, or any other way.

Q. If a man was standing straight it could not have made that kind of a hole, could *he*?

A. I would not judge that he could.

Q. How tall did you say that man was?

A. I took him to be about six feet.

Q. Six feet or a little over, you said.

A. He may have been an inch or two over.

Q. How did you lay him when you got him into that barber shop? Which way were his feet?

A. The barber shop was standing this way, and we laid him that way; I guess it was kind of north and south.

Q. Were his feet towards the door?

A. There were two doors.

Q. Were his feet towards either door?

A. Yes, sir.

Q. How was his head?

A. It was toward a door too.

Q. The doors were in the end of the barber shop, were they?

A. Yes, sir.

Q. Was his head towards the river?

A. Yes, sir.

180 Q. His feet were from it?

A. Yes, sir.

Q. This shot that went in in front, which side did it go in on?

A. It went in about here, I suppose [indicating on lower part of breast].

Q. That is on the left side?

A. Yes, sir.

Q. About an inch and a half or two inches from a line running down the center of the body?

A. Yes, sir.

Q. Where did it come out?

A. Come out in the back.

Q. Whereabouts in the back?

A. On the left side of the back bone under the left shoulder blade.

Q. Appeared to have gone straight through him, did it?

A. Yes, sir.

Q. About how far above the belt would that be where that ball entered?

A. Well, I don' know; it would not be far above the belt on me.

Q. Well, about how far above the belt on him? You are putting it in the same relative position, are you not?

A. I could not tell; I expect a couple of inches or more.

Q. About how many inches?

A. I could not say.

Q. You have described the course of it other ways, how it came out, and all about the other wounds; can not you put about how far above the belt it was?

A. No, sir; because I did not measure it.

Q. You know it came out about opposite under the left shoulder blade left of the back bone, and yet you can not tell how low down it was?

A. I can not tell you just exactly.

Q. You can tell about how far it was?

A. It may have been a couple of inches.

Q. Was it about a couple of inches?

A. Yes, sir.

181 Q. About a couple of inches above the belt?

A. Yes, sir.

Q. Did you see any other wounds on him?

A. No, sir.

Q. Do you know Joe Flynn?

A. No, sir; I don't believe I do.

Q. Mort Miller?

A. I know Miller.

Q. Was he there at the time?

A. I don't recollect if he was; he wasn't in the house.

Q. Do you know George Carter?

A. Yes, sir.

Q. Was he there?

A. If he was he was outside; he was not in the house.

Q. How do you know he was not in the house?

A. Because I was there myself.

Q. You know that neither one of these others were in the house?

A. Yes, sir; I know that.

Q. Was there anybody else in the house except you all?

A. Not while we were washing and dressing the man, there was not.

Q. How do you know that?

A. Because it was a warm, hot, and sultry evening; the house was smal', and we could not get around, and we would not let any of them in there.

Q. They were all out in the yard?

A. Yes, sir.

Q. Who wouldn't let them in there?

A. Downing and myself.

Q. Did you all have any authority to keep them out.

A. No, sir; we didn't.

Q. If these men said they were in there you would not dispute that, would you; if they said they were in there and looked at the body and the wounds, you would not dispute their word on that question, would you?

A. I would dispute their word as far as their being in there helping towards him; anything of that kind. I will dispute their word on it that they were not in there when I was in there washing and dressing him.

182 Q. There was nobody in there except you all until you got his clothes all on?

A. No, sir; there was two or three stepped in the door; I don't recollect who they were, and we put them out. They came to the door and wanted in and we would not let them in.

Q. Didn't you say they came t' the door?

A. Yes, sir; they came to the door.

Q. The' would just come and stop in the door?

A. Yes, sir.

Q. And you all put them out afterwards?

A. Yes, sir.

Witness excused.

183 EDWARD SMITH, having been duly sworn upon behalf of the defense, was examined by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. Your name is Ned Smith?

Answer. Edward Smith.

Q. They call you Ned Smith sometimes?

A. Yes, sir.

Q. Are you related to the defendant?

A. Yes, sir.

Q. What relation are you to him?

A. First cousin.

Q. Were you living at Webbers Falls at the time James Gentry was killed?

A. Yes, sir.

Q. How long had you been there?

A. I don't remember how long I had been there.

Q. How long had you lived there at the time of the killing of Gentry?

A. I was there—I don't know how long it was that I had been there before the day of the killing.

Q. Had you lived anywhere else in the Nation, or had you lived elsewhere?

A. Yes, sir; I lived out near Muskogee before that.

Q. How far was that from the Falls?

A. 20 miles, I believe they c'll it.

Q. What business were you in there at the time of the killing?

A. I was working for Mr. Blackstone, clerking in the store.

Q. Did you see Famous Smith on the day of this killing?

A. Yes, sir.

Q. Where did you see him?

A. I saw him there at the store.

Q. What did he do there? Did he do anything? Did he come in the store?

A. He came in the store and he bought something, but what it was I don't remember just what.

184 Q. Did he talk with any one there?

A. I never noticed him with any one only Mr. Vore there at the store at the time.

Q. Frank Vore?

A. Yes, sir.

Q. If you learned about the killing that day, who did you first learn it from?

A. I learned it from Mr. Vore.

Q. While he was there, or soon after, or how?

A. Soon after he left.

Q. Soon after Famous left there Mr. Vore told you about it?

A. Yes, sir.

Q. Mr. Vore told you that Famous had killed Gentry?

A. Yes, sir.

Q. Did you see Gentry's remains that day?

A. Yes, sir; I saw them that night.

Q. Then you did not go down to Russell's, or down to where they were, that day?

A. No, sir.

Q. You were there clerking in the store?

A. Yes, sir.

Q. You saw them that night?

A. Yes, sir.

Q. Do you know whether Gentry was an Indian or a white man?

A. He claimed to be an Indian; I don't know whether he was or not.

Q. How long did you know him there before the killing?

A. I don't know exactly how long before he was killed.

Q. Were you down at the place where he was said to have been killed afterwards, and if so, when?

A. I was there next morning after the killing.

Q. Was there anybody else there?

A. Louis Crapo was there that I know of, and if there was any one else I don't remember. I know there was some children there, but I don't remember who else.

Q. Do you remember whether or not Mr. Frank Vore was along there?

185 A. No, sir; I don't.

Q. You don't remember Crapo?

A. Yes, sir; I remember him.

Q. How come you to go down there?

A. I went down there by the request of Mr. Vore, I believe—Mr. Frank Vore.

Q. What did you go for?

A. We went to see where he was killed and to see if we could find anything there, or any sign of anything, or any evidence at all.

Q. Did you find anything?

A. I found a knife there?

Q. What other signs did you see?

A. We saw where horse had went along, where he had turned out of the road, and blood there where the man had fell.

Q. How far, about, from where he had turned out of the road? Describe how he went. Did he go on the outside of the road a little ways, run along, or how was that?

A. I could not tell you exactly how far outside the road the horse went. It has been a good long while since I was there. I don't believe I have ever passed by the road since, and it has been about 10 years ago anyhow since I saw it.

Q. Anyhow you saw where the horse had left the road and passed along beside the road and where there was blood?

A. Yes, sir.

Q. Now, with reference to that blood spot, where did you find the knife—how far from it?

A. I found the knife right between where the horse turned out of the road, and the place where he done fell.

Q. How far from the blood did you find the knife?

A. I expect it must have been 20 or 30 feet, maybe further, and maybe not so far.

Q. Where was it with reference to the horse tracks?

A. It was right on a line with the horse tracks.

186 Q. Who found that knife?

A. I did.

Q. What condition was it in?

A. The knife was half open—one blade was half open.

Q. Describe the knife as near as you can.

A. The knife was a big horn handle knife. It had one long blade, and then a short blade and a little blade.

Q. Was there any lettering on the blades?

A. On the long blade it said "cattle knife" on it, and on the short blade—that is, the short big blade—it said "tobacco blade," or "tobacco knife," I don't remember which, whether it was "tobacco knife" or "tobacco blade;" but it was one of the two.

Q. What did you do with the knife?

A. I kept the knife about two years and lost it.

Q. The knife was not called for by anyone, or was it?

A. No, sir; it was not called for by anyone.

Q. Where was Famous in the meantime? Had he gone out of the country or where was he?

A. I don't know where he was.

The DISTRICT ATTORNEY. Don't lead your witness.

Mr. BARNES (of counsel for defendant). Anyway, you kept the knife for a couple of years and lost it?

A. Yes, sir.

Q. Did you have any conversation with Famous that day of the killing?

A. No, sir; none that I remember of.

Q. Do you know anything about the knife or how it got there, except what you have stated?

A. No, sir.

Q. Did Famous have any conversation with Rocky Smith that day when he was there?

A. Not that I saw.

Q. I believe you say that Mr. Vore is the one that you thought Famous talked to?

A. Yes, sir; he is the only one I saw him talk to.

187 Cross-examination by the DISTRICT ATTORNEY:

Q. What relation are you to Famous?

A. First cousin.

Q. What time next day was it you went down there and found that knife?

A. It was in the morning.

Q. What time?

A. I could not say just exactly what time it was.

Q. About what time?

A. I could not state that either.

Q. Who asked you to go down there?

A. Mr. Vore suggested that we go down.

Q. I thought you said that Rocky Smith asked you to go?

A. No, sir.

Q. Do you know what time it was when you left home; when you left Webbers Falls to go down there?

A. It was in the morning.

Q. After breakfast?

A. Yes, sir; after breakfast.

Q. How far was it from Webbers Falls to where you had to go?

I don't know exactly how far it was.

Q. Who did you take with you?

A. Louis Crapo, I think.

Q. Who is Louis Crapo?

A. He is a man, a Cherokee fellow.

Q. A Cherokee Indian?

A. Yes, sir.

Q. Any akin to the defendant?

A. Not that I know of.

Q. He is here, is he not?

A. Yes, sir.

Q. Where did you go when you first went down there? Who showed you where the place was?

A. I think Frank is the one who told us where it was, and then we went out there ourselves. I don't know that any one showed us.

Q. Frank who?

A. Vore.

Q. He didn't go with you then?

A. I don't remember whether he did or not.

188 Q. Who do you think was along with you?

A. Crapo.

Q. You and Crapo by yourselves?

A. That is all I remember.

Q. If Frank had been along with you you would have remembered it?

A. I don't know whether I would or not.

Q. Wouldn't you remember him just as well as you would Crapo?

A. I might and I might not.

Q. You think Frank told you where the place was, and you went to it; did you get any of the neighbors to go with you to it?

A. No, sir.

Q. Why didn't you go down that evening?

A. We were busy that evening.

Q. Were you any more busy that evening than you were the next morning?

A. No, sir.

Q. Why did you go next morning if you didn't go the evening before because you were busy? You were equally busy the next morning were you not?

A. No, sir.

Q. Were there a great many customers in the store when Famous came there?

A. I don't remember just exactly how many there was there.

Q. Who suggested that you go down there?

A. Mr. Vore.

Q. What did he suggest? What did he say to you?

A. I don't know that I can repeat it just as he said it.

Q. Well, as near as you can? Did he tell you to go down there that you might find something?

192 A. No, sir; he did not speak it in that way.

Q. What did he say? Let's have it.

A. I was trying to think.

Q. Well, take time enough about it, I want you to be particular about this.

(After a pause.) A. Well, I don't just remember how it was, but I think though the way he said it that we ought to go down there and make some closer search, I believe, than had been made.

Q. Frank Vore said that?

A. Yes, sir; I believe that was it.

Q. That you ought to go down there and make some closer search than had been made?

A. Yes, sir.

Q. Search for what?

A. Search for anything, I suppose, that could be found there.

Q. Did you ask him what you were to search for?

A. No, sir; I didn't.

Q. If you were starting out to search for something, you would not be liable to know what you wanted unless you had been told, would you?

A. No, sir; not unless he had told me what he wanted me to search for.

Q. And you say you don't think Frank went with you?

A. I do not remember of his going.

Q. And he told you that he thought you ought to go down there and make a closer search than had been made?

A. Yes, sir.

Q. Had there been any search made there?

A. I suppose so, I don't know whether there had or not; I reckon so, but I don't know who or when they went.

Q. Or what they were looking for?

A. No, sir.

Q. Why didn't you ask Frank what you should look for?

A. I don't know why I didn't ask him.

193 Q. Frank had been there at the store all that evening, had he not?

A. I could not tell you whether he had been there all the evening or not.

Q. You had seen him?

A. I think he was there all that evening.

Q. Do you mean to tell this jury that Frank Vore never told you that Gentry was attacking this man with a knife when he shot him?

A. That Frank Vore never told me?

Q. Didn't tell you before you went down there to look for that knife?

A. You say, didn't I tell him——

Q. Do you mean to tell this jury now that Frank Vore never told you before you went down there to look for the knife that when Famous Smith shot Gentry, Gentry was attacking him with a knife?

A. No, sir; I never——

Q. You don't mean to tell them that; what do you mean to tell them?

A. I just mean to tell them what I know about it, that he told me it was before——. Maybe I do not understand your question; just put it over again.

Q. Do you mean to tell this jury that Frank Vore had not told you before you went down there to look for that knife that Gentry had attacked Famous with a knife when Famous Smith shot him?

A. Yes, sir; that is what I mean to tell them.

Q. And you mean to say further that when Vore told you that Famous Smith had shot Gentry you did not ask him why he had shot him.

A. Yes, sir.

Q. You did?

A. Yes, sir; I didn't ask him.

Q. And that you didn't ask him how many times he shot him?

A. No, sir.

194 Q. Didn't ask him what it was about?

A. No, sir.

Q. Or anything about it?

A. No, sir.

Q. In other words, when Frank Vore told you that your cousin had killed a man, you asked no questions about it at all?

A. No, sir; not that I remember of.

Q. You would have remembered if you had asked them?

A. I might have done it, and I might have forgotten them.

Q. You mean to say further when you went down there to look for the knife you had not learned from anybody that Famous claimed that Gentry had attacked him with a knife?

A. If I did I do not remember it?

Q. You mean to say that when Frank Vore told you you ought to go down there and make a closer search than had been made, you did not know what you were to search for?

A. No, sir; I didn't know anything definitely, but the way I understood when he said that was to go and look over the ground and see where he was killed, and where the horse had went and where the man had fallen off; something to that effect.

Q. You were simply down there looking for horse tracks and where the man had fallen?

A. Yes, sir.

Q. And for that you were to make closer search than had been made before?

A. Yes, sir; closer examination.

Q. Had you been down there before?

A. No, sir.

Q. You understood you were to go down there and see where the horse tracks were, and where the man had fallen, and that is all you were to look for?

A. It wasn't all exactly I was looking for I don't suppose, for I was looking for anything I could find there.

Q. When you found this knife you did not attach any importance
195 to it, did you?

A. I just only find the knife was all.

Q. What did you do with the knife?

A. I kept the knife about two years.

Q. When you found the knife you called this man Crapo up and showed him, and said, "Here is the knife?"

A. Yes, sir.

Q. What knife?

A. The knife I had found.

Q. You did not attach any importance to it?

A. No, sir.

Q. You did not think it was Gentry's knife?

A. I didn't know whose knife it was.

Q. You just called his attention to the fact you had found a knife there?

A. Yes, sir.

Q. And that is all?

A. Yes, sir; that is all.

Q. What condition was the knife in?

A. The knife was half open, one blade.

Q. In this condition [indicating by opening a knife half way]?

A. Yes, sir.

Q. Was it the large blade or the small blade that was open?

A. The large blade.

Q. There was other blades in it?

A. Yes, sir.

Q. A long blade, a short blade, and then a small blade?

A. Yes, sir

Q. Was it an old knife or a new knife?

A. It was neither an old or new knife.

Q. You could see the lettering on it plain, couldn't you?

A. Yes, sir; you could see the lettering on it, but it wasn't a new knife, or it wasn't an old knife.

Q. You showed that knife to the man that was with you?

A. Yes, sir.

Q. Then what did you do with it?

A. I lost the knife afterwards.

196 Q. I am not talking about loosing it; you did not loose it for two years?

A. You asked me what I did with it?

Q. What was the next thing you did with it?

A. Picked it up and put it in my pocket.
Q. What did you do then?
A. Went on back to the Falls.
Q. You had found the knife?
A. Yes, sir.
Q. Did you make any map of the place or any measurements?
A. No, sir.
Q. Did you step off the distances?
A. No, sir.
Q. You just went there and found horse tracks and the blood, and found this knife, and then you got on your horse and went right to town?
A. No, sir; I walked to town.
Q. You and he had walked down there?
A. Yes, sir.
Q. What did you do with the knife when you got to town?
A. I don't remember just what I did do with the knife; I know I didn't give it to any one.
Q. Did you show it to any one?
A. I showed it to Rocky.
Q. What did you tell him?
A. I told him there was a knife I found there where that man was killed.
Q. What did he say about it?
A. I don't remember what he did say about it. He taken the knife and showed it to Mr. Blackstone, I think.
Q. Didn't you show it to Mr. Blackstone?
A. I don't know whether I did or not.
Q. What did Mr. Blackstone say about it?
A. I don't remember whether he said anything about it or not.
Q. Now, didn't you take that knife back there and show it as the knife that Gentry had used in that fight?
A. No, sir; I did not.
197 Q. Didn't you show it to Mr. Blackstone?
A. To the best of my knowledge, I didn't do it.
Q. You would have known it if you had done it?
A. I might have or might not.
Q. You say you didn't have an idea that Gentry had used the knife; had never heard of it; therefore you could not have been showing it as the knife that Gentry used, because you had never heard of his using a knife?
A. I don't remember of showing it as his knife, or the knife that he used, or anybody else. I told them it was the knife, as well as I remember, that I found there.
Q. Didn't you take that knife back to Blackstone and tell him that there was the knife that Gentry had had, and did he not tell you that that was not Gentry's knife?
A. I don't remember of giving it to him at all.
Q. Don't you remember that he told you that wasn't Gentry's knife?
A. No, sir; I do not.
Q. You didn't know whose knife it was, did you?
A. No, sir.
Q. Where and when did you first find out it was Gentry's knife?

A. I don't know as I found it out yet.

Q. You never did know; you don't know now; you do not claim that was Gentry's knife?

A. No, sir; I don't know anything about it.

Q. You don't know anything about it?

A. I know I found a knife there, but whose knife it was I don't know—whether it was Gentry's or somebody else's.

Q. Was it a pretty good knife?

A. Yes, sir; a good knife.

Q. Good stock, mainspring, and everything?

A. It was a good knife.

198 Q. What size knife was it?

A. It was not a very large knife; I could not tell you what size it was.

Q. About how long was the blade?

A. I could not tell you just exactly how long the blade was.

Q. Nobody ever told you it was Gentry's knife, did they?

A. No, sir.

Q. You showed it around there to different people?

A. I do not know that I showed it to many of them.

Q. You showed it around some, didn't you, and you just kept it? Did you ever tell Famous Smith that you had found it?

A. No, sir; I don't believe I ever told him.

Q. You never told any one but Rocky and Blackstone, if you told him?

A. I didn't tell Mr. Blackstone at all.

Q. But you did tell Rocky Smith; you say you never told Blackstone at all?

A. Not that I remember of.

Q. You did not show it to Blackstone?

A. Not that I remember of.

Q. And nobody ever asked you for the knife?

A. No, sir.

Q. Rocky Smith didn't ask you for it?

A. No, sir.

Q. Didn't tell you to keep it?

A. If he did I do not remember it.

Q. There was no importance attached to it, was there?

A. I don't know whether there was or not.

Redirect examination by Mr. THOMAS H. BARNES:

Q. You speak of living in Muskogee, and you had been down there to clerk; where is your home now?

199 A. My home is still near Muskogee.

Q. How long was it before you went back after you had gone there where you were clerking?

A. I don't remember how long it was.

Q. Was it a month or not, or was it a year?

A. It might have been a month, or it might have been two months before I went back home.

Q. Then you were not down there a great while after that until you went back to your home up near Muskogee, which you say was 20 miles from there?

A. Yes, sir.
Q. And you lived back there near Muskogee ever since?
A. Yes, sir.
Q. Then you were just down there temporarily for Blackstone?
A. Yes, sir; just there clerking for him.
Witness excused.

200 LOUIS CRAPO, having been duly sworn upon behalf of the defense, was examined by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. What is your name?
Answer. Louis Crapo.
Q. How old are you?
A. 48.
Q. Where do you live?
A. I live in Illinois Station.
Q. How far is that from Webbers Falls?
A. About a mile and a half.
Q. Do you know about the time that James Gentry was killed up there near Webbers Falls?
A. Yes, sir.
Q. Where were you living then?
A. I was living at the Falls.
Q. Do you know this defendant?
A. Yes, sir.
Q. Are you any akin to him?
A. No, sir.
Q. You were living at the Falls when this happened?
A. Yes, sir; I run a blacksmith shop.
Q. Did you see the remains of Gentry after he was killed—his body?
A. No, sir; I never saw him after he was killed.
Q. Did you see his body after it was brought to the Falls?
A. No, sir; I did not see it.
Q. Did you know Gentry?
A. Yes, sir; I seen him; I never got acquainted with him; I saw him around the shop once in awhile.
Q. Do you know whether he was a white man or an Indian?
A. No, sir; he looked kind of dark like some kind of a tribe; he might be an Indian, a Creek, or something that way.
Q. But you do not know about that?
A. No, sir; only he looked like he might be of some tribe of Indians.

201 Q. He might have been a Creek?
A. Yes, sir.
Q. Might he not have been a Cherokee too?
A. Yes, sir; that is what I say.
Q. As a matter of fact if a man who is some Cherokee and some Creek, if he was not a full blood, you could not tell it from his appearance one way or another as to which tribe he belonged, I reckon. Now then, if you were down at the place where he was said to have been killed just tell us when that was?

A. One fellow came to the shop——
Q. Who was that fellow?
A. I knew the fellow——
Q. Who was it?
A. Ned Smith.
Q. Go on.
A. He said let's take a walk. And we went up there. We went up there where that fellow had been killed, and he said "Let's look for a knife."
Q. Was there anybody else along?
A. I don't recollect.
Q. Was Mr. Frank Vore along?
A. I don't recollect; he might have been, but it has been so long.
Q. You recollect Smith coming to the shop and said "Let's take a walk," and you went up there?
A. Yes, sir.
Q. Now, when you got there just tell us what was done, what was found, if anything?
A. He said, when we got there, "Jim Gentry had a knife; let's look for it." He said they said he had.
Q. After you got there he said they said Gentry had a knife; let's look for it?
A. Yes, sir; we looked for it, and directly we found the knife.
Q. Where did you look; that is, did you see any blood spot there, or any horse track?
A. No, sir; I never noticed.
Q. Did you notice a blood spot?
A. No, sir.
202 Q. Did you see any horse tracks?
A. No, sir.
Q. Where did you find the knife?
A. Right in the brush.
Q. How far from the road?
A. As near as I can think of it about 5 feet from the road.
Q. Then you did go up there to that place where this man is said to have been killed—that is, you went along with this man?
A. Yes, sir.
Q. And near that place, about 5 feet from the road, you found a knife in the brush?
A. Yes, sir.
Q. Who found it, Smith or you?
A. Smith found it.
Q. Did you see him when he found it?
A. Yes, sir; I saw him find it.
Q. Describe how he did?
A. He said "Here is a knife" and he straightened up and he had the knife.
Q. You saw him when he straightened up with the knife?
A. Yes, sir.
Q. When he said "Here is the knife" you saw him straighten up and there was the knife?

A. Yes, sir.

Q. Do you know what condition the knife was in, whether it was open or shut?

A. No, sir.

Q. You don't remember about that?

A. No, sir.

Q. That is the most you can say on that?

A. That is all.

Q. What time of day was that?

A. It was about something like 8 o'clock, about the time I opened up my shop—just about 8 o'clock or along there.

Q. Did you have a knife in your hand?

A. Yes, sir; he had the knife.

Q. Did you have the knife in your hand while you were there?

203 A. No, sir; I did not.

Q. You did not examine it then?

A. No, sir.

Q. Do you know what kind of a knife it was?

A. No, sir.

Q. So you did not have the knife after it was picked up there?

A. No, sir.

Q. You saw it there in his hands?

A. Yes, sir.

Q. After he stooped down and said what you have stated he did to the jury, you saw the knife inn his hands?

A. Yes, sir.

Q. You think that was about how far from the road, about five feet?

A. Yes, sir; it was about five feet, near as I can tell it.

Cross-examination by the DISTRICT ATTORNEY:

What time in the morning was it you say when Ned Smith came down there?

A. About 8 o'clock in the morning.

Q. Who was with him?

A. There was nobody with him.

Q. Was Frank Vore with him?

A. I don't remember; he came by my house.

Q. Who came by your house?

A. Ned Smith.

Q. Did you all go down to this place?

A. I could not recollect if Frank Vore was with us or not; I know that Ned was along with me.

Q. Who else was along besides you and Ned?

A. Nobody else was along, that I know.

Q. What did Ned say to you that morning at the shop?

A. He said "Let's take a walk."

Q. Did you ask him where to?

204 A. No, sir; it was right soon in the morning, and I thought maybe he wanted to stir around, and we went off aways, and he said "Let's go over yonder where that killing was done yesterday," and I told him all right, and when we got there, he said, "Let's look for a knife."

Q. What knife?

A. Pocket knife.

Q. What pocket knife?

A. He claimed that Jim Gentry had a knife, and that is what he said.

Q. Ned Smith told you that Gentry had a knife in his fight with Famous Smith, and that is the knife you were looking for?

A. Yes, sir.

Q. How long did you look for it?

A. We didn't look only about five minutes.

Q. Was he ahead of you or behind you when he found it?

A. He was behind me sorter.

Q. You had walked on past and he was behind?

A. Yes, sir.

Q. What was the first thing you heard him say when the knife *ws* was found? When he found the knife what did he say?

A. He said "Here is Jim Gentry's knife."

Q. Was he standing up then with it in his hand?

A. Yes, sir.

Q. Had it in his hand when you first saw it?

A. I don't remember whether the knife was closed or not.

Q. You don't remember what kind of a knife it was?

A. No, sir.

Q. He said "Here is Jim Gentry's knife?"

A. Yes, sir.

Q. He had told you about that, had he, that Jim Gentry had a knife when he had the fight with Famous?

A. Yes, sir.

Q. And that you would all go down there to look for it and see if you could not find it, and when he picked it up he said, "Here is Jim Gentry's knife?"

205 Mr. BARNES (of counsel for defendant). He didn't state that; he said he said that after he got there.

The DISTRICT ATTORNEY. After you got there he said, "Let's look for Gentry's knife." When was it he told you that Gentry had a knife in his hand when he had a fight with Famous?

A. He never said; he just said that that was his knife.

Q. He had told you before what knife he was going to look for, was he not?

A. Yes, sir.

Q. He had told you before that that Gentry had a knife when he had a fight with Famous, didn't he?

A. Yes, sir.

Q. Was that going down there, or after you got there, that he told you that?

A. It was after we got there. When we got there he said, "Let's look for the knife," and I said, "All right."

Q. When was it that he told you that Gentry had had a knife when he and Famous had the difficulty? Was that after you got down on the ground, or as you were going there?

A. We were going on the ground; we just walked.

Q. I know you walked. Did he tell you that after you found the knife or before that?

A. I don't understand you.

Q. When he had the knife in his hands did he tell you that is the knife Gentry had when he cut at Famous? Did he tell you that then?

A. Yes, sir.

Q. After he had the knife in his hands?

A. Yes, sir.

Q. That is the knife that Gentry had when he cut at Famous? He told you that?

A. Yes, sir.

Q. What did you do with the knife?

A. I don't know.

Q. The first thing he said to you that morning was, "Let's go and take a walk?"

A. Yes, sir.

206 Q. And you walked on some distance?

A. Yes, sir.

Q. And he said, "Let's go over yonder where these fellows had a fight," and then when we got over there he said, "Let's look for a knife?"

A. Yes, sir.

Q. And then he found the knife?

A. Yes, sir.

Q. About five minutes after he got there?

A. Yes, sir.

Q. And then he told you that was the knife that Gentry had when he cut at Famous?

A. Yes, sir.

Q. Now, wasn't Frank Vore along at that time?

A. No, sir; I could not tell you that. I only recollect Ned.

Q. You don't know what kind of an Indian Gentry was, if he was an Indian at all, do you?

A. No, sir; I could not prove nothing that way. He looks dark.

Q. He wasn't as dark as you were, was he?

A. Yes, sir; he was a little lighter than I am.

Q. You think that he looked a lighter color?

A. Yes, sir.

Q. The Cherokees are a better looking people than the Creeks, are they not?

A. I don't know.

Witness excused.

207 RICHARD SCOTT, having been duly sworn upon behalf of the defense, was examined by the counsel for defense, Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. What is your name?

Answer. Richard Scott.

Q. Are you an Indian or a white man?

A. Indian.

Q. Where do you reside?

A. I live at Vian now, up here in the Indian Territory.

Q. You know about the time when James Gentry was killed, I reckon?

A. Yes, sir.

Q. I will ask you where you were living at that time?

A. Webbers Falls. I was living at Col. Brewer's, about seven miles above Webbers Falls.

Q. Were you about the Falls sometimes?

A. I was there quite often.

Q. Did you know Gentry?

A. Yes, sir.

Q. Are you any akin to Famous Smith?

A. No, sir.

Q. How long had you known Gentry previous to the time that he was killed?

A. I can not say exactly; probably a year since I had first met him.

Q. Where did you first meet him?

A. Down on Canadian, near Bob Vann's.

Q. When you first met him, was he living in the Cherokee or Choctaw Nation?

A. He told me that he was living in the Choctaw Nation working at some mill; I don't remember the name of the mill now though.

Q. You met him over in the Cherokee Nation near Bob Vann's; that is when you first met him?

A. Yes, sir.

208 Q. At that time he was working at some mill, as you understood, in the Choctaw Nation?

A. Yes, sir.

Q. How often did you ever meet him before he lived up there about Webbers?

A. Well, I never met him a great many times; I met him several times; I don't remember just how many times. He was working for Famous Smith there.

Q. Do you know how long he had been there previous to this killing about the Falls?

A. No, sir; I can not just remember how long; probably three or four months, maybe longer; I won't be positive about that.

Q. Was he a Cherokee Indian or not?

A. Yes, sir; I suppose so; he claimed to be, and he looked like he was a Cherokee Indian. He said that he was a Cherokee Indian, and I always thought that he was, and supposed him to be.

Q. Do you know how he was regarded there, how he was received by the people as to whether he was an Indian or not?

A. Everybody seemed to think that he was an Indian. Nobody didn't dispute it at all, and had no reason to, I reckon.

Q. If you ever had any talk with Gentry in regard to any knife, just tell the jury in your own way all about it.

The DISTRICT ATTORNEY. Any conversation he had at that time about his knife would not be competent, I think. If he knows the knife he can identify the knife; that would be competent.

Mr. BARNES (of counsel for defendant). Did he ever get a knife from you?

A. Yes, sir.

Q. State the circumstances.

A. I was in the Falls on the Saturday before the killing, a week before——

The DISTRICT ATTORNEY. I don't want this witness to state any conversation.

209 Mr. BARNES (of founsel for defense). I suppose he would have a right to state the occurrence of the passing of the knife.

The DISTRICT ATTORNEY. If he got a knife from this man he can say that he got a knife from him, or that the other man got a knife from the witness, and describe the knife.

Mr. BARNES (of counsel for defense). Do you want me to lead him?

The DISTRICT ATTORNEY. No; you can ask him if this man ever got a knife from him, and if so, what kind of a knife it was.

Mr. BARNES (to witness). Answer it that way.

The WITNESS. Yes, sir; he got a knife from me. It was a buck horn handle knife; had three blades in it.

Q. Where and when?

A. On Saturday before he was killed.

Q. How come him to get it from you?

A. He just took it——

The DISTRICT ATTORNEY. That is not competent. If he got the knife I think that is all you want to know, and all I think is competent.

Mr. CRAVENS (of counsel for defendant). Did he borrow it and claim it as his own?

Mr. BARNES (of counsel for defendant). Where did he get it from you?

A. At Webber's Falls, at the mill.

Q. What were you doing with the knife at the time, if anything?

A. I was whittling with it.

The DISTRICT ATTORNEY. I want it understood I object to anything Gentry said.

Mr. BARNES (of counsel for defendant). If you can state the occurrence between you and Gentry without stating the conversation,

210 just go on and state it, tell the occurrence about the knife.

The DISTRICT ATTORNEY. We object to that. I think that the only thing material to this whole thing would be that Gentry got the knife from the witness. What the conversation was between the witness and Gentry at the time, or what Gentry said, I do not regard as material; I think it is incompetent. We do not make any objections to the statement that he got the knife from him, that he took it away from him, or anything of that kind, but we do not want any conversation that he may have had with Gentry in regard to this matter. There is only one class of conversation that would be competent, and that would be a threat against this defendant.

Mr. BARNES (of counsel for defendant). It is merely to show how the knife passed.

The DISTRICT ATTORNEY. Your witness has testified that he got the knife from him. It is the identity of the knife you are trying to prove, I suppose.

Mr. CRAVENS (of counsel for defendant). We think it is competent to show that the deceased got a knife from Scott, this witness, claiming it as his knife. We have other testimony to show then that Scott had a knife and Gentry had a knife, and Bob Nann had a knife—that these three par-

ties had knives precisely alike. Now, the circumstance which we are proposing to prove is that Gentry came up to this witness, who was whittling with his knife, and says "What are you doing with my knife," and took it out of his hands, and the witness, Scott, was directly called away, and left Gentry with the knife. We want to show simply that he took the knife out of his hand, claiming it was his own. That is the only suggestion we have to make.

211 The COURT. He may state it that far.

Mr. BARNES (of counsel for defense). State how that was.

A. He took the knife out of my hand and said, "What are you doing with my knife?" and I says, "I guess it is not yours," and he says, "I have one just like it; they are good knives, ain't they?"

Q. He took it out of your hand?

A. Yes, sir.

The DISTRICT ATTORNEY. I don't understand that he has said that yet.

Mr. BARNES (of counsel for defendant). Yes, he has. (To witness.) What did you do after that? What did he do? What became of the knife?

A. We were standing there whittling, and directly after that I got up and walked up town, and I don't know where he went to. I never got the knife any more, and I never saw him any more.

Q. Did you get in conversation with anybody else, or do anything? Did anything come up to divert your attention?

A. We started up town together, me and Gentry, from the mill, and we met somebody and he turned around and went back to the mill with them, and I went on up to town. That is the way we separated. I don't remember who it was we met at that time.

Q. Now, describe that knife a little more minutely, if you can. What sort of a handle did it have?

A. It had what we call a buck horn handle.

Q. How many blades?

A. Three blades, and on the long blade there was "cattle knife," and on the little short blade, sort of hooked around that way, it said, "tobacco blade."

Q. Was there any other blade?

A. The other blade was just a small blade. I don't think there was any letters on it.

212 Q. Did you ever know what became of the knife?

A. No, sir; I don't know what became of it. After I heard that he was killed I asked somebody about the knife, and I never did get it. I never knew what became of it.

Q. Did you see him any more after that, after he was killed?

A. No, sir.

Q. You lived, I believe you say at that time, seven miles from there, at Col. Brewers?

A. Yes, sir.

Q. He is dead now?

A. Yes, sir.

Q. You think this was on the Saturday before the killing?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. What time did the killing take place?

A. I don't remember; sometime in the middle of the week it seemed to me like.

Q. When did you first hear about it?

A. I don't remember whether it was the same day or the day afterwards.

Q. Who did you hear it from?

A. I don't remember that. I don't remember who brought the news up to Col. Brewers. I heard it up there.

Q. How far did you say that is from Webber's Falls?

A. It is about seven miles I believe they call it.

Q. When were you in Webber's Falls the next time?

A. I think I was there that same week after the killing; I know I was; they would generally send me down to the mill every Saturday.

Q. You generally staid around town when you went there, like
213 most boys would, didn't you?

A. Yes, sir.

Q. Loafing around?

A. Yes, sir; a part of the time.

Q. You talked about things that happened?

A. Yes, sir.

Q. You heard the circumstances of the killing detailed, did you not?

A. Yes, sir; I heard about the killing.

Q. You heard about what the circumstances were; you heard that Gentry had attacked Famous with a knife, didn't you?

Yes, sir.

Q. And you heard about the knife being found down there, did you not?

A. Yes, sir.

Q. And you heard who found the knife?

A. I didn't hear who found the knife. I did not hear who got the knife.

Q. You heard that the knife was found there?

A. Yes, sir.

Q. Did you ever go to Famous's brother and ask him about it?

A. Yes, sir. I asked him for the knife; some one said to see Rocky—that was his brother—and I went to Rocky, and he said, "I guess you can't get the knife, if it was yours; I guess they wouldn't give it up." He never said who had it.

Q. You never inquired any further?

A. No, sir; I just let it alone then.

Q. Anybody ever come to you and show you the knife?

A. No, sir.

Q. Nobody asked you to identify the knife that Gentry had taken from you?

A. No, sir.

Q. You told Rocky the circumstances?

A. Yes, sir.

Q. Rocky never asked you to look at the knife?

A. No, sir; I don't know whether he had it or not.

Q. Did you know Ned Smith?
A. Yes, sir.
Q. Ned was in the store that Rocky was, was he not, at that
214 time.
A. Yes, sir; I believe he was; he was clerking there at that time.
Q. Did you deal at that time at that store?
A. I traded there some.
Q. You never asked Ned Smith to show you the knife.
A. I do not know that I ever asked Ned to do it, or about it, or not.
Q. Did you ever know that Ned had the knife?
A. No, sir.
Q. You never heard that?
A. I never heard it until right lately; if I had I would have asked him about it and asked him for it.
Q. Of course you would, but when you asked Rocky for it he told you he did not think they would let you have it, anyway.
A. Yes, sir.
Q. Why?
A. He did not say, "I guess they won't let you have it, anyway," he says.
Q. And you just quit inquiring about it?
A. I didn't think it was worth while; I just thought I would get the knife back after awhile, and I never thought any more about it.
Q. You didn't ask Rocky who had it?
A. No, sir.
Q. Did you want your knife?
A. I wasn't particular about it.
Q. You didn't care anything particular about it one way or the other? And I guess the knife wasn't much account anyway, was it?
A. Yes, sir; it was a good knife.
Q. You didn't ask Rocky Smith who picked it up?
A. No, sir.
Q. You didn't ask him who had it or anything about it?
A. No, sir.
215 Q. And you never did inquire about it afterwards, did you?
A. I never inquired anymore about it, when Rocky said I couldn't get it he guessed, he said they might need it.
Q. Need it for what?
A. He said he might need it for evidence after awhile.
Q. And yet he never asked you to look at it to identify it; never told you who had it?
A. No, sir.
Q. And you never asked him anything more about it afterwards?
A. No, sir.
Q. You never asked anybody about it?
A. No, sir.
Q. You never asked Rocky who found it?
A. No, sir.
Q. Never asked him where it was?
A. No, sir.

Q. And he never asked you to look at the knife?
A. No, sir.
Witness excused.

(Jury take a short recess.)

216 TIMOTHY FIELDS, having been duly sworn upon behalf of the defense, was examined by Mr. Thos. H. Barnes and testified as follows, to wit:

Question. What is your name?
Answer. Timothy Fields.
Q. What is your age?
A. 73.
Q. Where is your home now?
A. Fort Gibson.
Q. Are you an Indian?
A. Yes, sir; I pass for such.
Q. What tribe of Indians do you belong to?
A. Cherokee.
Q. Where were you living in 1858, somewhere along there?
A. I was living near North Fork, on the Canadian.
Q. What nation?
A. Cherokee Nation.
Q. How far was that from Fishertown?
A. That was called about 6 miles; it is somewheres along in the neighborhood of that.
Q. Is that one place known now as Texana?
A. No, sir; Texana is in the neighborhood of that country there.
Q. Texana is the name of the country around?
A. Yes, sir.
Q. Fishertown was about 6 miles from where you lived?
A. Yes, sir; that was in the Creek Nation.
Q. How far did you live from the Creek line?
A. From where I live it might have been in the neighborhood of a mile and a half from the Creek line.
Q. Where did you live with reference to a place called Standing Rock? A place on the North Fork.
A. I lived a little north of Standing Rock.
Q. How far from Standing Rock?
A. From where I lived to the Rock, the way the road run, it must have been about three miles.

217 Q. Did anybody live between you and Standing Rock?
A. Yes, sir; there is several living there.
Q. Who were they?
A. There was an old lady lived near Standing Rock by the name of Holly Warspeaker, was the name she went by, and there was another old white lady lived below her, and I can't remember that old lady's name, and there was another one next to the edge of the bottom by the name of Susie Arnold, living in there.
Q. Did you know any man by the name of Gentry living in that neighborhood?
A. Yes, sir.

Q. Where did he live?

A. He lived right in below Susie Arnold's farm; his place joined on my farm field.

Q. What was his first name; what did they call him?

A. We called him Kajo Gentry. His place joined on to my bottom field.

Q. Did he live in the bottom or the foot-hills?

A. He lived right on the edge of the bottom.

Q. How far from you was his house?

A. From his house to where I lived, out on the edge of the prairie, it must have been a mile or three-quarters; somewheres along there; I could not say for certain.

Q. Did he have a bottom field away from the place where he lived, or did he live at his bottom field?

A. He lived right on the edge of his field there.

Q. In going to his field would he pass your place, or how would that be?

A. My bottom field laid below his place.

Q. Then, in going from where you lived on the edge of the prairie to your bottom field, would you go by where he lived or not?

A. Yes, sir; I had to go right by where Gentry lived.

Q. When did you know him there last?

218 A. The last time I saw Gentry was in the spring of 1858.

Q. Was he a married man or a single man.

A. He was a married man.

Q. Did he have any children?

A. To the best of my recollection he had two children; I know there was one at the breast.

Q. What was Gentry?

A. He was a Cherokee.

Q. Do you know who his mother was?

A. His mother was a sister to old John Drew; she was an aunt of this John Drew——

Q. Was John Drew a Cherokee?

A. Yes, sir.

Q. Then he was a Cherokee Indian?

A. Yes, sir.

Q. His mother was a sister to old John Drew, who was a Cherokee Indian?

A. Yes, sir.

Q. And he lived there and he had an adjoining farm to you?

A. Yes, sir.

Q. The last time you knew him there he had a family of two children?

A. Yes, sir; to the best of my recollection.

Q. Do you know what sex they were or what ages?

A. No, sir; I could not say what they were.

Q. One of them was a baby at the breast?

A. Yes, sir.

Q. What year was that?

A. It was in the spring of 1858.

Q. What became of Gentry?

A. He was killed there in the Creek Nation near Fishertown.

Q. I don't suppose you know that of your own knowledge; but when did you learn of his being killed?

A. At the time that John Drew gathered a crowd to go and look for his nephew I went in the bunch.

Q. Whereabouts did you go?

A. We went and looked in the Creek Nation, over near Fishertown, where some Creeks were living.

Q. Who was it that was supposed had killed him?

219 A. They supposed it was the Creeks that lived there who had killed him.

Q. Well, how did it happen?

A. I am not able to tell how it happened. We understood they had been gambling.

Q. And he was killed by some of the Creeks; supposed to be killed by them?

A. We never could find him.

Q. You didn't find him when you were with old John Drew and others searching for his remains? How many miles was that from where you lived?

A. It must have been, to the best of my recollection, about four or five miles.

Q. Did you move away from there after that time?

A. Yes, sir; I sold out my place there that summer and went up to the upper part of the Nation, in the summer of 1858.

Q. What do you call the upper part?

A. The upper part of the Nation.

Q. What district?

A. Delaware district.

Q. You sold your place that summer and went to the Delaware district?

A. Yes, sir.

Q. Do you know of your own knowledge what became of his wife and children—anything about that?

A. No, sir; I never did see them after I moved away from there.

Q. I suppose you don't know anything about this killing, or whether this man James Gentry, who was killed by the defendant, was the son of this man Kajo Gentry or not?

A. No, sir.

Q. Did you ever see James Gentry?

A. Yes, sir; I have seen him.

Q. How long has it been since your eyesight failed? You seem to be nearly blind?

A. About three years ago.

Q. You say you have seen James Gentry, the man it is said Famous Smith killed, or did you ever see him?

A. Yes, sir; I saw him.

Q. Where did you see him?

220 A. I saw him driving Famous' logging team there about the Falls.

Q. Did you know him?

A. I just heard them call him Gentry; I was not acquainted with him at all.

Q. Did you ever talk with him?

A. No, sir.

Q. Do you know whether he was an Indian or not?

A. No, sir; I could not say within myself whether he was or not.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. When did you say that Kajo Gentry was supposed to have been killed?

A. In the spring of 1858.

Witness excused.

221 RICHARD CROSSLIN, having been duly sworn upon behalf of the defense, was examined by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. What is your name?

Answer. Richard Crosslin.

Q. What is your age?

A. I will be 60 years old in October next—or 61, I mean.

Q Are you a white man or an Indian?

A. I am an Indian; I am part white, though.

Q. But then you are an Indian?

A. Yes, sir.

Q. What tribe?

A. Cherokee.

Q. Did you ever know a man by the name of Kajo Gentry?

A. Yes, sir.

Q. When did you know him?

A. I knowed him I believe it was in 1856 or 7, along there in that time.

Q. Where did you know him?

A. In Webbers Falls, in the Cheroke' Nation.

Q. What age was he at that time?

A. I don't know exactly how old he was; he might have been 22 or '3 years old; he looked like he was a man grown.

Q. You think it was in 1856 or 1857 you knew him about Webbers Falls?

A. Yes, sir.

Q. State whether or not he was an Indian?

A. He was considered an Indian.

Q. Do you know who his mother was reputed to be there in that country?

A. His mother was a sister to old John Drew, is my understanding.

222 Q. Did you know her in her lifetime?

A. No, sir; I did not know her.

Q. How far did you live from the Falls at that time?

A. I lived about three miles from the Falls.

Q. Do you know where Kajo Gentry lived at the time you knew him?

A. He lived in a section of country there called Texana, about 25 miles from where I lived, or something near that.

Q. Did he live on any river, or particular place there about Texana?

A. I don't know exactly where he lived.

Q. Do you know where Standing Rock is?
A. Yes, sir.
Q. Was it up in that section of the country?
A. Yes, sir; it is in that section of the country.
Q. Do you know what became of him of your own knowledge, anything about that?
A. No, sir.
Q. Do you know Famous Smith, the defendant?
A. Yes, sir.
Q. How long have you known him?
A. I have known him ever since he was a boy, 25 or 30 years.
Q. Do you about the time it is claimed he killed a man named James Gen ry up there?
A. Yes, sir.
Q. Up to the time of that killing do you know what his character was in the neighborhood there as to being a peaceable, law-abiding man—that is, how the people regarded him?
A. His character was good.
Q. You know how it was then?
A. Yes, sir.
Q. How h' was esteemed by the people generally?
A. Yes, sir; that was his character up to that time. He never was in any trouble that I ever knew anything about.
Q. This is the first trouble you ever knew of his being in?
A. Yes, sir.
Cross-examination waived.
Witness excused.

223 Dr. W. W. CAMPBELL, having been duly sworn upon behalf of the defense, was examined by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. Is your name W. W. Campbell?
Answer. Yes, sir.
Q. What is your business?
A. Well, I follow farming; I do not farm it myself, but I have a farm that I run. I am a physician by profession.
Q. Are you or not a citizen of that Indian country?
A. Yes, sir.
Q. Where do you reside?
A. At Illinois Station, on the Valley Route Railroad.
Q. How near is that to Webbers Falls?
A. Just about one mile, I guess.
Q. Did you ever go to school at Tahlequah—to an Indian school there—or college?
A. I went to a school, a male seminary near Tahlequah.
Q. When, doctor?
A. It was back in about 1851 or 1852, when I was young.
Q. State whether you knew a boy or a young man there by the name of Gentry?
A. I knew a man there by the name of Kajo Gentry.
Q. At that school?

A. Yes, sir.
Q. Was he a schoolmate of yours?
A. Yes, sir.
Q. What is your age?
A. I am 57 the 8th day of last March.
Q. Was he older or younger than you?
A. I would have taken him to have been several years older than I was; I wasn't not quite grown, and he was a grown man. I would take him to be two or three years older than I was.
224 Q. He was grown at that time?
A. Yes, sir.
Q. Was he an Indian?
A. He was always considered an Indian. I regarded him as an Indian.
Q. He was there at the Indian school?
A. Yes, sir; I never knew him as anything else except an Indian.
Q. Do you know what became of him?
A. No, sir. The last I saw of him was there; I lost sight of him after I left there.
Q. Do you know the defendant here, Famous Smith?
A. Yes, sir.
Q. How long have you known him?
A. Well, I have known him since about, I reckon, 1867 or '68; somewheres along there; since the war.
Q. You know about the time it is claimed that he killed a man up there at Webber's Falls named Gentry?
A. Yes, sir; I knew him at that time, but I don't know the time.
Q. With reference to that time now, please state if you know what his general character was there in the community where he lived as to being a peaceable, law-abiding man previous to that killing?
A. I think he was a law-abiding man.
Q. Do you know how the people regarded him?
A. He was regarded, I think, as a law-abiding man. He was a little wild. That is about all that can be said of him. He was considered a nice man, a man that would pay his debts; and he was an enterprising man, but he was a little wild.
Q. What do you mean by "wild"? Would he take a drink?
A. He might take a little whiskey once in a while and get tight like the balance of the boys, but he was considered to be a good man up to that time—a very good man.
Q. Do you know what position he held at that time?
225 A. No, sir; I do not.
Q. As to being a peaceable man then up to that time you say his character was good?
A. His character was considered about as good as most of the people of that country. He had some faults, like the balance of people.
Q. You like a drink yourself, don't you?
A. Well, I believe I do.
Q. You do not think that makes you so wild as to hurt you?
A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. You say he was a little while?

A. Yes, sir.

Q. Do you mean he would drink whiskey and get on a tear?

A. I never saw him but a very few times that I thought he was out of the way.

Q. What made you think he was wild?

A. Because he would take whiskey once in a while, and I could hear of him being a little wild occasionally.

Q. He was pretty handy with his gun, was he not?

A. I never knew of him doing any serious depredations with his gun at all.

Q. Did you ever know of his doing any depredations with it at all?

A. I must confess that I do know of him shooting a man there once, but I can tell the circumstances 'nder which he shot him.

Q. Was that before he shot Gentry?

A. Yes, sir; that was before. The man shot his brother-in-law,
226 and tried to make his escape and he stopped him with his pistol.

Q. Did he ever shoot anyone else that you know of?

A. That is all.

Q. When was that?

A. I can't really tell you the year.

Q. Did he kill him?

A. No, sir; he did not kill him.

Q. Did you ever hear of any other time?

A. No, sir; I believe not.

Q. Did you ever hear of his getting into any row or trouble of any kind?

A. I never heard of him getting into any trouble whatever. I never saw him get into any trouble.

Q. Then his character for being a peaceable man was just moderate?

A. Yes, sir; I thin' it was moderate; medium. Was medium or an average.

Q. This man Kajo Gentry that you saw was a white looking man?

A. No, sir; dark, very dark skin. Looked like he might be as dark as the prisoner there.

Q. Was he married at that time?

A. Really, I don't believe he was; he was a student at that time. I don't believe he was married, but I could not say positively about that.

Q. You don't know what became of him?

A. No, sir.

Q. You never saw him any more after you got through school with him?

A. No, sir. That has been 30 years ago, nearly; it was when I was a boy.

Q. Where do you live?

A. In Illinois Station, Cherokee Nation.

Q. How far is that from Webbers Falls?

A. It is two miles from Webbers Falls; maybe a little further than that, but not much.

Q. Do you know Timothy Fields?

A. Yes, sir.

Q. How far do you live from him?

227 A. He lives I think up about Fort Gibson, about 25 miles, I think.

Q. You have practiced medicine up over that country, have you not?

A. Yes, sir.

Q. You go for a considerable distance at times?

A. Yes, sir; sometimes I do.

Q. Did you ever go up in that country where Timothy Fields lived?

A. I have been in that country several different times, but I never practiced medicine quite that far up.

Q. You have been up there a great many times?

A. Yes, sir.

Q. You never heard of this man Gentry any more?

A. No, sir.

Redirect examination by Mr. THOMAS H. BARNES:

This man you speak about had killed the sheriff, had he not—Joe Vann?

A. Yes, sir; he killed Joe Vann.

Q. He didn't kill the man he shot at; he just wounded him in trying to arrest him after killing the sheriff?

A. Yes, sir; as I understand it he had shot the sheriff and was running off, and he shot at him to stop him.

Q. The sheriff died from his wounds, did he not?

A. Yes, sir.

Witness excused.

228 EDMOND FLEETWOOD, having been duly sworn upon behalf of the defense, was examined by Mr. Wm. M. Cravens, and testified as follows, to wit:

Question. Your name is Edmond Fleetwood?

Answer. Yes, sir.

Q. Where do you live?

A. I live about 22 miles west of Fort Smith.

Q. Are you a Cherokee?

A. Yes, sir.

Q. You were raised in the Cherokee Nation, were you?

A. Yes, sir; I have been born and raised there.

Q. Did you know Kajo Gentry in his lifetime?

A. Yes, sir.

Q. Was he an Indian or a white man?

A. He was of Creek and Cherokee blood.

Q. Did you know Jim Gentry, the man that Famous Smith is charged with killing?

A. Yes, sir; I was personally acquainted with him.

Q. Where did you first become acquainted with Jim Gentry; where did you first see him?

A. Well, I seen him when he was small, at his daddy's.

Q. Where did you first see him after he became a grown man?

A. He was quite a boy then; he came to my house in the Deleware district.

Q. Who was his dad'y?
A. Kajo Gentry.
Q. You say he came to your house in the Deleware district?
A. Yes, sir.
Q. Was that after his father's death, or when was it?
A. After his death; since the rebel rebellion; he worked for me.
229 Q. How long ago was that; when was it?
A. It was about the time we had the first paynent; we got about ten dollars and forty cents. It was since the war, and that would have thrown it somewhere along in 1871 or '2.
Q. This boy came to your house at that time?
A. Yes, sir; about that time.
Q. How long did he stay there?
A. He worked for me some three or four months.
Q. About what age was he then?
A. I don't know, just to look at him; he wasn't a man grown; he was getting nearly a man, though; he was a good strip of a young fellow.
Q. About what age would he be?
A. I took him to be somewhere from 15 to 18; ranging along there somewhere.
Q. He staid with you three or four months, you say?
A. Yes, sir.
Q. Did he claim to be an Indian?
A. He told me that he was a Cherokee and Creek mixed, and a son of Kajo Gentry.
Q. You say that he was there when you got the payment; did he participate in the payment?
A. He got me to represent him at the enrollment and get his name enrolled?
Q. Did you do so?
A. Yes, sir.
Q. Did he draw?
A. I went with him to the payment, and he told me that he got his money at Vinita.
Q. What kind of a payment was it?
A. It was a payment to the Cherokee citizens of the Cherokee Nation; each and every citizen, red, white, and black, drew what was known as bread money.
Q. He drew in that?
A. Yes, sir.
Q. You lived then in the Deleware district?
A. Yes, sir.
Q. Do you live in the Deleware district now?
230 A. No, sir; I live in the Sequoyah district.
Q. Did you ever see him at your house in the Sequoyah district?
A. Yes, sir.
Q. How long before he was killed?
A. It was n't a great while—two or three months; he came there and me and him went over into the Choctaw country and attended a picnic there together. He was at my house three or four times while he was at Webbers Falls.

Q. When he came to your house while you lived in the Sequoyah district where was he living?

A. He claimed that he was living at Famous Smith's at Webbers Falls.

Q. And he was there three or four times, you say, while he lived at Famous Smith's?

A. Yes, sir.

Q. And he claimed to be a Cherokee and a son of Kajo Gentry?

A. Yes, sir; that is what he told me. He always passed for that; never claimed anything else but that.

Q. What did he look like—his complexion?

A. He looked like an Indian; he was dark complected; showed to be a quadroon Indian, to look at him.

Q. Showed to be a quarter-blood?

A. Yes, sir; he had black hair and eyes.

Q. And dark skin?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. Did you say you were born and raised up there?

A. Yes, sir.

Q. In what district?

A. I have lived in all of the different districts except one in the nation.

231 Q. What one were you born in?

A. I was born in the Coo-wee-scoo-wee district, at the mouth of Pryor's Creek.

Q. Where did you know Kajo Gentry?

A. I knew him on the waters of the Canadian, and I knew him up there near his aunts, where I was born at. He had an aunt living there.

Q. Who did?

A. Kajo did.

Q. Where was he raised, where did he live?

A. I believe he is like myself; I believe he lived in all parts of the nation, mostly made his home on the Canadian there.

Q. Where was he when you knew him the last time?

A. He was on the waters of the Canadian.

Q. What district is that in?

A. It is in the Canadian district.

Q. What aged man was he then?

A. I would have taken him to have been, to the best of my recollection, some 35 or 38 years old.

Q. How long ago has that been?

A. Well, it has been a little before the rebel rebellion came up.

Q. A little before the rebellion?

A. Yes, sir.

Q. 35 or 38 years old before the rebellion?

A. Yes, sir.

Q. Was he married then.

A. Yes, sir; he was a man of a family—he had a family at the time.

Q. How many children?

A. I don't know the amount of children; there was two or three children about the place.

Q. Who had he married?

A. The woman was an Indian; I don't know whether I knowed who she was before he married her or not.

Q. She was an Indian?

A. Yes, sir.

Q. What became of Kajo Gentry?

A. He was killed.

Q. Where?

232 A. He was said to have been killed right on the Creek line.

Q. What year?

A. Somewheres about '58 or 9.

Q. You think he was 35 or 38 years old at that time?

A. Yes, sir.

Q. When was it you first saw this boy called Jim Gentry?

A. The first time that I seenn him to know exactly who he was was when I lived in Deleware, and he said he was one of the old man's boys, but he wasn't big enough when I first saw him, according to our conversation, to have any talk with him.

Q. What year was that?

A. It was in 1871 or 2.

Q. You say then he was about 15 or 18 years old?

A. Yes, sir; a good big boy.

Q. Where was his wife—the wife of Kajo? What became of the balance of the family; did you ever hear of the rest of the family?

A. Yes, sir; I think I have; there was several families all connected with them.

Q. Named Gentry?

A. Not of the Gentry name, I never did.

Q. None except him?

A. No, sir; none but Jim—not by the name of Gentry.

Q. How old are you?

A. I am 49 years old; I will be 50 next Christmas day.

Q. You say that this man drew a payment from the Government?

A. Yes, sir; he got me to represent him, and I represented him and had his name put down.

Q. Did you get his name put down?

A. Yes, sir; I got the collector to put it down.

Q. Did he ever tell you this last time you saw him that he was having any trouble about his citizenship up there in the nation?

233 A. Yes, sir; he told me that he had trouble ab'ut voting; they objected to his voting because he had not been in the district long enough. They challenged his vote, and he wanted me to see into it, and I told him there wasn't anything to see into, that a vote didn't count anything; it was just because he hadn't been there long enough to vote.

Q. Do you know whether he had any other trouble or not?

A. He didn't state any other to me in the world. He claimed that his kinfolks all recognized him, and that he was in peace and harmony outside of voting. He did not state a word of trouble outside of that.

Q. What business are you engaged in up there?

A. I farm a little.

Q. Have you any other business outside of that?

A. I can't say that I do; sometimes I practice physic a little.
Q. You practice medicine?
A. Yes, sir; farming is my principal occupation.
Q. How long before his death was it you saw him the last time?
A. I think must have been somewhere in the course of two months before his death that he was at my house.
Q. Did you see him after his death?
A. No, sir; I nev'r did.
Witness excused.

234 ROBERT TINER, having been duly sworn upon behalf of the defense, was examined by Mr. William M. Cravens, and testified as follows, to wit:

Question. Your name is Robert Tiner?
Answer. Yes, sir.
Q. Where do you live?
A. Three miles west of Webbers Falls.
Q. Are you an Indian?
A. No, sir.
Q. How long have you lived there in that section of the country?
A. I have lived there about 19 years.
Q. Did you know Jim Gentry in his lifetime?
A. Yes, sir.
Q. Do you know whether he was an Indian or a white man?
A. No, sir; I don't.
Q. What did he look like; what was his complexion?
A. He was dark colored; looked like he might be a part Indian.
Q. You don't kn'w what he was?
A. No, sir.
Q. How long have you known Smith?
A. About 19 years.
Q. When did you last see Gentry before he was killed?
A. Well, it was a few days; I could not state exactly the number, but it was a few days before he was killed.
Q. Where did you see him?
A. I saw him last at my house.
Q. Did he have any conversation there with you in reference to Smith?
A. Yes, sir.
Q. What did he say in reference to him?
A. He came there and stopped at the well and called me out to the well and I went out and he asked me——

Q. Do you know how many days it was before this killing?
235 A. No, sir; I could not state the exact number; a few days though.
Q. Was it as much as a week?
A. Something near a week.
Q. Tell us what he said?
A. He called me out to the well, and asked me if I had bought that mare that I had got from Smith that spring to work, and I told him I had, and he remarked that Smith was cutting up about this horse, and if he didn't mind his damned horse wouldn't do him no good.

Q. Did he seem to be angry or in good humor, or how was that?

A. I thought he seemed to be mad about it; I took him to be mad. I didn't ask him any more questions or anything more about it.

Q. Did you see Mr. Smith after that, before Gentry was killed?

A. Yes, sir.

Q. Did you inform him of it?

A. Yes, sir.

Q. What did he say?

A. I saw Mr. Smith and told him that Gentry had rode down that mare and that I didn't want him to ride her, and after Gentry had made that talk to me at the well I told him what Gentry had said about it, and he did not say anything about it.

Q. You told him about the talk that Gentry had had?

A. Yes, sir.

Q. How long have you known Famous Smith?

A. About 19 years.

Q. Do you know his general character in the neighborhood for being a peaceable law-abiding man?

A. Yes, sir.

Q. Is it good or bad?

A. It is good.

Cross-examination by the DISTRICT ATTORNEY.

Q. When was it you say that he made these threats? How far do you live from Famous Smith?

A. Now I live about 2 miles, I think.

236 Q. Wher' did you live then?

A. I lived about a mile from Famous Smith's then, or a mile and a quarter.

Q. On one of his places?

A. Yes, sir.

Q. A renter from hi'?

A. Yes, sir.

Q. Do you rent from him now?

A. No, sir.

Q. When was it that Gentry came to your house?

A. I could not tell you the day of the week or day of the month.

Q. How long before he was killed?

A. It must have been something near a week.

Q. What time in the day was it?

A. I could not tell you what time it was for certain.

Q. Was there anybody else present?

A. No, sir; my mother was at home, but he just called me out to the well; there was nobody right present.

Q. What did he call out there for?

A. I suppose to ask me if I had bought that mare.

Q. What mare?

A. The one I had got from Smith to work the spring before.

Q. What is the first thing he said to you?

A. He told me to come out there, and I went, and that is the question he asked me; he asked me if I had bought that old mare from Famous Smith.

Q. What did he say then?

A. He said Famous was cutting up about his horses, and if he did not mind his damned horses would not do him any good.

Q. What did you understand him to mean by what he said?

A. I just understood him this way; that he was mad.

Q. Did you tell Famous Smith about it?

A. I supposed that he had got mad because Smith had made him quit riding the mare.

Mr. CRAVENS (of counsel for defense). You had complained to
237 Smith.

A. Yes, sir.

The DISTRICT ATTORNEY. Why did you complain about it? Did not the mare belong to Smith?

A. No, sir; I had a contract with him for the mare; I was to pay for her that fall.

Q. You didn't want Gentry to ride her the way he was riding her?

A. No, sir.

Q. And you had to complain about it to Smith?

A. Yes, sir.

Q. Smith had stopped him?

A. I suppose he had.

Q. When was it you told Smith?

A. It was a few days afterwards Gentry came to my —; that is, I told him about him riding the mare. I told Smith about it before he came to my house and called me out to the well.

Q. That is not answering the question. How long was it after that when you told Smith of what Gentry had said, after this conversation you had with Gentry?

A. It was not more than a day or two. I think it was that evening or the next day after me and Gentry had that conversation at the well until I saw him and told him about it. It was that evening or the next day.

Q. Did you go up and tell him about it?

A. No, sir.

Q. Where did you tell him?

A. He came riding by my house.

Q. How long had Gentry been living there?

A. I think he came there about December before the killing in August. I think it was along about Christmas, the first I recollect of seeing him.

Q. He was living there at Famous's, was he?

A. Yes, sir.

Q. From December on up until about the time he was killed?

A. Yes, sir.

Q. That was in the Canadian district, was it?

A. Yes, sir.

Witness excused.

238 Mrs. ROBERT VANN, having been duly sworn upon behalf of the defendant, was examined by Mr. Wm. M. Cravens, and testified as follows, to wit:

Question. What is your name?

Answer. Cooey.

Q. You are the wife of Robert Vann?

A. Yes, sir.

Q. Do you know Mr. Famous Smith?

A. Yes, sir.

Q. Did you know James Gentry in his lifetime?

A. Yes, sir.

Q. I will ask you if he was at your house a short time before he was killed?

A. Yes, sir.

Q. Did he make any threat in your presence about Mr. Famous Smith; and if so, what it was?

A. He didn't call any names; he just made a threat that he was going to blow his life out.

Q. What did he say?

A. He said if he had a certain horse that Mr. Blackstone had he would blow a man's life out and leave the country.

Q. Who was present when this conversation took place?

A. My husband.

Q. How long was that before the killing?

A. It was four or five days, as well as I remember.

Q In the day or in the night time?

A. It was in the night.

Q. Was Gentry a white man or an Indian, or what did he claim to be?

A. He claimed to be an Indian.

Q. What kind of an Indian?

A. Cherokee, he said.

Q. What did he look like? What was his complexion?

A. He was tolerable dark, and black hair.

Q. Claimed to be a Cherokee?

A. Yes, sir.

Cross-examination waived; witness excused.

239 ROBERT VANN, having been duly sworn upon behalf of the defendant, was examined by Mr. William M. Cravens, and testified as follows, to wit:

Question. Your name is Robert Vann?

Answer. Yes, sir.

Q. Where do you live?

A. I live down on the Canadian River, about 10 miles from Webbers Falls.

Q. In the Cherokee Nation?

A. Yes, sir.

Q. Did you know James Gentry in his lifetime?

A. Yes, sir.

Q. Was he a white man or an Indian?

A. He said he was a Cherokee.

Q. He claimed to be a Cherokee?
A. Yes, sir.
Q. Who did he claim was his father?
A. He claimed that Cajo Gentry was his father.
Q. Was he about your house much?
A. Yes, sir; he was for six or eight months around me in that neighborhood.
Q. Do you mean staying there all the time, or just off and on?
A. He was there pretty near all the time in the run of that time.
Q. Do you know whether at the time he was killed he had a knife; and if so, what kind of a knife, or shortly before he was killed? You say he had been about you a good deal; what do you know about his having a knife?
A. I saw Jim Gentry down at my house; he came there on Saturday, and just before the election at Webbers Falls, and he had a pocketknife; went out to cut corn, and he used his knife.
Q. What kind of a knife was it?
A. It was a knife nearly like this knife I have in my hand
240 here. It had "Cattle knife" on one blade and "Tobacco" on the other. I had a knife just like it, and he used his knife.
Q. Do you know Dick Scott?
A. Yes, sir.
Q. Do you know whether he had the same kind of a knife or not?
A. Yes, sir; he had a knife just like Jim Gentry's.
Q. You had a cattle knife—what is called a cattle knife, with this lettering on the blade, and tobacco on one blade. Gentry had the same kind of a knife and Dick Scott had the same kind of a knife?
A. Yes, sir; we all three had knives just alike.
Q. Was Scott a relative of yours; was he in the habit of coming to your house?
A. Yes, sir; he is kin to us, or claims to be.
Q. This was the Saturday before the election that Gentry was at your house, and in cutting corn you saw him have this knife?
A. Yes, sir; I saw the knife.
Q. You had the same kind and Dick Scott had the same kind?
A. Yes, sir.
Q. I will ask you if shortly before this man was killed he was at your house?
A. Yes, sir; he was at my house.
Q. When was he there last before he was killed?
A. He left my house on Monday morning, on the day of the election; he came on Saturday and staid all night with me, and went on Friday in the Choctaw Nation, and Sunday morning he came back and staid there Sunday night.
Q. He was at your house Saturday?
A. Yes, sir.
Q. And staid there Saturday night?
A. Yes, sir.
Q. Sunday he went into the Choctaw Nation, and came back and staid Sunday night?
A. Yes, sir.

Q. Was that the day he was cutting corn or before then?

241 A. Yes, sir; it was Saturday evening and Sunday that he was there.

Q. Did he make any threats against Famous Smith or say anything about him in your presence.

A. He told me whenn he first came home on Saturday evening, when we were feeding the horses, when we were cutting the corn, I had a black horse there, and he asked me what I would take for the horse and I told him I didn't want to sell him; I just had two; I didn't want to break the match, and he said if he had that horse h' would just kill Famous Smith and leave the country. I told him I was going to tell Famous what he said.

Q. He said if he had that horse he would kill Famous and leave the country?

A. Yes, sir.

Q. Did he have any other conversation on the subject while there?

A. Yes, sir; we kept on talking around, and he said if he—I don't remember the exact words—but he said if he had a little horse Bob Blackstone had that they called Dock he said he would just blow Famous's light out and leave the country, and I told him I was going to tell Famous, and I did tell him.

Q. He said if he had your horse, when he was cutting corn, the black horse, he would kill Famous and leave the country; and at another time he said if he had Blackstone's horse, the one they called Dock, he would blow Famous's life out and leave the country?

A. Yes, sir.

Q. Did you tell Famous that?

A. Yes, sir; I did.

Q. Where did you see him?

A. I saw him Monday morning at the election.

Q. And you told him what Gentry had said, did you?

A. Yes, sir.

242 Cross-examination by the DISTRICT ATTORNEY:

Q. How long did you say Gentry had been about your place there?

A. He had been there 6 or 8 months, or something like that.

Q. Where do you live?

A. I live at Webbers Falls.

Q. In the Canadian district?

A. Yes, sir.

Q. He had been making that his home around there, had he?

A. Yes, sir.

Q. Did he make his home with you?

A. Part of the time he did.

Q. Who else did he live with?

A. He staid most of the time with Mrs. Hays and myself.

Q. Did he show you this knife, or did you just see it in his hand.

A. No, sir; we were cutting corn, as I said before, and I asked him to let me see it—I had one just like it—and he showed it to me, and I know he did have that kind of a knife.

Q. He showed it to you?

A. Yes, sir.

Q. Was it a new or an old knife?
A. A new knife—not brand new, but a knife as new as mine.
Q. How long was that before he was killed?
A. Four or five or six days.
Q. Did he say when he had bought it or where he had gotten it?
A. No, sir; he said, "I guess they came out of the same box; they are just exactly alike."
Q. Was yours a new knife?
A. Yes, sir.
Q. How long had you had yours?
A. About a week, I guess, or something like that.
Q. His was about as new as yours?
A. Yes, sir; pretty near the same knife, as well as I remember.
243 Q. He said he was going to kill Famous—if he had your horse he would kill Famous and leave the country?
A. Yes, sir.
Q. And if he had Blackstone's horse he would blow Famous's life out and leave the country?
A. Yes, sir; that is just what he told me.
Q. Was that in the same conversation?
A. Yes, sir; near about it.
Q. It was at the same time?
A. No, sir; it was at different times.
Q. On the same trip?
A. It was all at the same Saturday and Sunday.
Q. He told you what it was about, too, did he—why he was goin' to do it?
A. No, sir; he didn't say why he was going to do it. I told him if he wanted my horse for that purpose he could not get it.
Q. You would not let him have your horse to kill Famous?
A. No, sir.
Q. He told you the reason he was mad at Famous, did he not?
A. No, sir; I don't believe *I* did.
Q. You asked him about it though, didn't you?
A. No, sir.
Q. You did not?
A. I don't remember that I asked him just the particulars.
Q. Didn't you ask him, "What is the matter with you and Famous?"
A. No, sir.
Q. You didn't try to find out?
A. I told him I was going to tell Famous when he told me if he had either one of those horses he would kill him.
Q. You have told that two or three times. You asked him what was the trouble between him and Famous, didn't you?
A. No, sir; I didn't try to find out the trouble between them at all.
244 Q. Why didn't you?
A. Just because I didn't want to find out, that is the reason.
Q. You didn't ask him any questions?
A. No, sir.
Q. You knew he had been working for Famous, didn't you?

A. Yes, sir.
Q. You never asked him anything about what he and Famous had fallen out about?
A. No, sir.
Q. And he had been living at your house and Famous was your neighbor?
A. Famous lived about 10 miles away from me.
Q. Famous was your friend?
A. Yes, sir.
Q. Gentry was your friend?
A. Yes, sir.
Q. Both of them your friends, and yet you never undertook to find out what was the difficulty?
A. No, sir.
Witness excused.

245 J. W. SPECK, having been duly sworn upon behalf of the defense, was examined by Mr. William M. Cravens, and testified as follows, to wit:

Question. What is your name?
Answer. J. W. Speck.
Q. Where do you live?
A. I live at Checota, now.
Q. Did you ever live in the neighborhood of Webbers Falls?
A. Yes, sir.
Q. Did you know James Gentry?
A. Yes, sir; I was acquainted with him about three months.
Q. Was he an Indian or a white man?
A. He claimed to be an Indian.
Q. What sort of Indian?
A. Cherokee.
Q. What did he look like?
A. He looked like an Indian.

Cross-examination by the DISTRICT ATTORNEY:

Q. Did he look like a full blood?
A. No, sir.
Q. About how much Indian?
A. He looked sorter like a quadroon; something like that.
Q. Are you an Indian?
A. No, sir; I am a white man.
Q. Where was he when you knew him?
A. On the Canadian.
Q. Who was he working for?
A. He was staying at Jane Hays, not working for anybody.
Q. How did he happen to tell you he was 'n Indian?
246 A. Because he claimed to be a cousin of Jane Hays.
Mr. CRAVENS (of counsel for defense). Was she an Indian?
A. Yes, sir.
The DISTRICT ATTORNEY. How far did she live from Famous Smith?
A. She lived 6 or 7 miles, maybe 8.
Q. Claimed to be a cousin of Jane Hays?

A. Yes, sir; she was a widow woman, and he was staying there with her. He claimed to be a cousin to her.

Q. That is all you know about it?

A. Yes, sir.

Q. You may stand aside.

Witness excused.

247 REESE HELTERBRAND, having been duly sworn upon behalf of the defense, was examined by Mr. William M. Cravens, and testified as follows, to wit:

Question. Your name is Rese Helterbrand?

Answer. Yes, sir.

Q. Where do you live?

A. McGhee.

Q. That is in the Cherokee Nation, is it not?

A. Yes, sir.

Q. Did you know James Gentry in his lifetime, the man who' Famous Smith is charged with killing?

A. Yes, sir.

Q. When did you last see him?

A. I saw him the last time when I was working at the mill at the Falls.

Q. How long was that before he was killed?

A. A couple of weeks—about two weeks.

Q. Did he have any conversation with you about Mr. Famous Smith?

A. No more than he wanted to borrow some little change to have fun among the hands, and I refused to let him have it; and I told him he was a single man and he ought to have money all the time, and, he says, "He brings me out in debt"——

Q. Said who brought him out in debt?

A. That Mr. Smith at the end of each month brang him out in debt; and then he says, "To-day two weeks I will make a settlement," and he says, "if he brings me out in debt then I will spill blood with him."

Q. Was Gentry a white man or an Indian?

A. I could not say; he claimed to be an Indian citizen.

Q. You don't know what he was?

A. No, sir; and then after he made them remarks he says, "I left one country for killing a damned dog, and I could leave another one."

248 Q. He said if he brought him out in debt when he settled with him the next time, two weeks from then, he would spill blood with him; that he had left one country for killing a damned dog, and he could leave another one?

A. Yes, sir; that is just the remarks that he made.

Cross-examination by the DISTRICT ATTORNEY:

Q. He was an intimate friend of yours, was he not?

A. I do not know; I wasn't to say acquainted with him; I just knew him when I saw him.

Q. He came to you to borrow money, did he not?

A. He wanted to borrow money to have a little fun among the hands there.

Q. And you had just seen him occasionally?

A. Yes, sir; I seen him occasionally hauling logs.

Q. You were not a friend of his?

A. Yes, sir; I was just as much a friend of his as I was any one else's, but still I was not acquainted with him.

Q. You just had a mere passing acquaintance with him?

A. Yes, sir.

Q. How much money did he want to borrow?

A. He just said a dime or a couple of dimes; he was going to have some fun with the boys.

Q. Have some fun with a couple of dimes?

A. Yes, sir.

Q. What kind of fun was he going to have?

A. The boss of the mill allowed them to pass the time with gambling among the hands.

Q. He wanted a dime or a couple of dimes to go into a game on.

249 A. Yes, sir.

Q. What was the boss of the mill named?

A. His name was Chew.

Q. He allowed Gentry to play cards?

A. He allowed it among the mill hands to play.

Q. He allowed them to gamble?

A. They didn't really gamble, I reckon; he would not allow any one else.

Q. They were gambling, were they not?

A. I suppose so.

Q. Did you ever gamble with them?

A. No, sir.

Q. You didn't play cards?

A. No, sir.

Q. Where did you go from?

A. I was raised right up between here and Tahlequah.

Q. Are you an Indian?

A. Yes, sir; a Cherokee.

Q. By blood?

A. Yes, sir.

Q. Are you a citizen?

A. Yes, sir; that is what me mother always told me.

Q. Are you a citizen up there?

A. Yes, sir.

Q. Do you vote?

A. Yes, sir.

Q. Draw money?

A. Yes, sir.

Q. Any akin to Smith?

A. No, sir; not that I know of.

Q. Where did Gentry tell you that he had come from?

A. I never did have any conversation or talk with him about where he came from.

Q. He was confidential enough with you to tell you that he was going to kill Smith?

A. He always claimed that he came from the Choctaw Nation is all the further I could trace him from.

Q. He was a Choctaw then. What country was that he said he had left when he killed that other man?

A. He didn't say.

Q. Did you ask him?

A. No, sir; I didn't ask him.

250 Q. Did you say that he claimed to be a Cherokee?

A. He claimed to be a citizen; he didn't say what; he claimed to be a citizen is what he said.

Q. He didn't claim to be a Cherokee then?

A. No, sir; I never did hear him claim to be a Cherokee.

Q. When he said that he left one country for killing a man you understood that he had left the Choctaw Nation?

A. No, sir; I didn't take it that way; I could not say where he left.

Q. Did you ask him?

A. No, sir.

Q. You never paid any more attention to it?

A. No, sir.

Q. You never told Famous Smith anything about this, did you?

A. No, sir; not until a good while afterwards I named it to him.

Q. After the killing?

A. Yes, sir.

Q. Where did you see Famous after the killing?

A. I saw him at my father-in-law's house.

Q. Who is your father-in-law?

A. His name was Ladeler.(?)

Q. How long after the killing was that?

A. I could not say exactly; it was when he went before the commissioner at Muskogee, after we got there the same day; I just made the remarks; brought it up myself; he didn't ask me for it; I said, "Mr. Smith, you ought to have my assistance," and I told him just what I have told here.

Q. That was several years after the killing?

A. No, sir; it wasn't several years; I could not tell exactly how long it was.

Q. Well, two or three years?

A. Probably may have been.

Q. That is the first time you ever told him about it?

A. Yes, sir.

251 IRVIN VORE, upon being recalled in behalf of the defendant, was examined by Mr. William M. Cravens, and testified as follows, to wit:

Question. Your name is Irvin Vore?

Answer. Yes, sir.

Q. You were summoned as a witness for the prosecution?

A. Yes, sir.

Q. How long have you known Famous Smith?

A. I have known him a good while. I could not tell you just exactly how long I have known him. Probably 25 years or 20 years.

Q. Did you serve on the police force with him?

A. Yes, sir.

Q. United States Indian policeman?

A. Yes, sir.

Q. I will ask you if you are acquainted with his general character in the neighborhood where he lived as to being a peaceable law-abiding man?

A. Yes, sir; he was considered so.

Q. That was his character was it?

A. Yes, sir.

Q. He was a peaceable, law-abiding man?

A. Yes, sir. He had been a deputy sheriff there before he was on the police force.

Cross-examination by the DISTRICT ATTORNEY:

Q. Do you knew any of the Drew family up in that country?

A. Yes, sir.

Q. It is a large family, is it not?

A. No, sir; not a very large family.

Q. Were there any of them living around there near where
252 Gentry was killed?

A. I think so.

Q. Was Mrs. Hays living around there anywhere in that neighborhood?

A. Yes, sir; Jim Hays's wife?

Mr. CRAVENS (of counsel for defense). No; the Widow Hays?

The WITNESS. I don't know whether she was or not or where she was when Gentry got killed.

The DISTRICT ATTORNEY. Where is she now, do you know?

A. I don't know; she is up in the upper part of the Nation somewhere.

Q. The Drew family is still living up there?

A. No, sir; they live at Tahlequah.

Q. They still live in the Nation?

A. Yes, sir.

Witness excused.

253 FRANK VORE, having been recalled upon behalf of the defense, was examined by Mr. Wm. M. Cravens, and testified as follows, to wit:

Question. How long have you known Famous Smith?

Answer. Ever since I remember; probably 30 or 35 years.

Q. Do you know what his general character up there about Webbers Falls is as to being a peaceable, law-abiding man or not?

A. I think it was good.

Q. It is good, is it?

A. Yes, sir; Famous is a little wild sometimes when he is drinking, but he is looked on as a peaceable and a law-abiding man. He was deputy sheriff there at one time.

Cross-examination by the DISTRICT ATTORNEY:

Q. You mean he was a peaceable, law-abiding man when he was sober?

A. Yes, sir.

Q. How much of the time was he sober?

A. He didn't drink a great deal.

Q. He was pretty handy with his gun, was he not?

A. I guess he was when he had to use it.

Q. Who buried this man who was killed?

A. Do you mean who paid for the shroud, clothing, and so on?
Q. Yes, sir?
A. Mr. Blackstone, I think.
Q. Mr. Blackstone was not related to him in any way?
A. No, sir.

254 Q. Was there any effort made to notify any relatives that he was dead?

A. I don't know anything about that; the man was working for Blackstone at that time, and I guess he felt like burying him because he was at his house and working for him.
Q. Mr. Blackstone buried him?
A. I think so; as well as I remember he furnished everything.

Redirect-examination by Mr. Wm. M. CRAVENS:

Q. He was working for Blackstone at that time?
A. Yes, sir.

Witness excused.

255 J. H. VESTAL, having been recalled upon behalf of the defense, was examined by Mr. Wm. M. Cravens, and testified as follows, to wit:

Question. How long have you known Famous Smith?
Answer. I have known him 17 or 18 years.
Q. Are you acquainted with his general character in the neighborhood of Webbers Falls, where he lived, for being a peaceable, law-abiding man?
A. Yes, sir.
Q. Is it good or bad?
A. It is good.

Cross-examination by the DISTRICT ATTORNEY:

Q. You never heard anything against his character as a peaceable, law-abiding man?
A. No, sir; nothing.

Witness excused.

Defense rests.
Testimony closed.

256 And after argument of counsel the court instructed the jury as follows:

257 In the circuit court of the United States, within and for the western district of Arkansas. May term, 1893.

THE UNITED STATES *vs.* FAMOUS SMITH. } Murder.

Charge of the court, delivered June 7th, 1893—3:15 p. m.

PARKER, J.

Gentlemen, the indictment in this case, found by the grand jury on the 13th of February, 1893, alleges that on the first of August, 1883, the

defendant, Famous Smith, with a gun took the life of James Gentry, and that he did that willfully and with his malice aforethought, making up what the law calls a charge of murder growing out of the act of the defendant in taking the life of Gentry. Your mission is to find out here whether that charge is true or not; to find out whether under the law this charge as made against the defendant has been sustained by the testimony. To do that you must consider two propositions. First, you consider the proposition which grows out of the definition of the crime, because it is by that that you can alone tell whether the crime of murder has been committed. You are to know, in other words, what that crime is in the law—not as you may consider it, or as I may contemplate it, but as the law defines it. Then you are to consider this other proposition which
258 grows out of the testimony in the case, the facts, what is the true state of case that you get from the evidence—the condition of things. You get it from the evidence, when you have viewed that evidence as reasonable men, when you have exercised your good judgment upon it, because you are not performing your duty when you simply take all that comes before you as conclusive evidence on a proposition. You never could arrive at any conclusion if that was the case, because when you take the statements of witnesses you find as a rule in the trial of cases on material propositions there is always a conflict, especially if the case on trial is one of great magnitude and great importance. It necessarily devolves upon you then to consider the evidence as to what story as told by the witnesses is the most reasonable in the light of all the circumstances, and in the light of the usual rule of human conduct that characterises the act of men under a given set of facts and circums ances. That is where the great duty of the jury comes in; that is where the great duty is to be performed, in finding in a rational and reasonable way what the truth of the case is.

There are several propositions which enter into this charge necessary to be found. I give you these propositions in detail that you may consider them; that you may consider whether or not as we go along that they have been found, whether or not they have been established by the testimony as required by the law to be established—beyond a reasonable doubt. It is charged in this indictment, and it is necessary to be charged to give the court jurisdiction, that James Gentry was a white man and not an Indian. The meaning of that is that he was a citizen of the United
259 States; or more correctly speaking, a jurisdictional citizen of the United States. Under the laws of this country every man in it, outside of a few persons who are exempted by the law, whether he is a full political citizen of the United States, or no matter what his relation in that regard may be, is a jurisdictional citizen. For example, we have a class of people who can not become citizens of the United States because of a prohibition by the law. I refer to the Chinees'; yet, if a Chinaman kills in the land he is a citizen so far as being subject to the law is concerned; and if anybody else kills him in the eye of the law he is a citizen. Practically he is not a citizen, because mobs kill him, and we do not do anything with them but laugh at them; but in the eye of the law he is a jurisdictional citizen. So it is with reference to everybody, except the people who are called Indians, and who are living upon their reservations, the places set apart to them, as such; and when an offense is committed there in that country by one

Indian upon another, the courts of that country alone have jurisdiction. This is now the rule with reference to the five civilized tribes, and the other Indians who are in that country only because the jurisdiction of the courts of the United States have been extended over what are known as the wilder tribes, or the wilder Indians. Different courts of the United States have jurisdiction over them. Now, then, that is the meaning of this allegation that James Gentry was a white man and not an Indian—that is, that he was a citizen of the United States. If he was, notwithstanding this defendant is an Indian, the court still has jurisdic-
260 tion. In this reservation of jurisdiction to the Indian courts they were not permitted to entertain jurisdiction of cases where upon the one hand a citizen of the United States was affected by the act of an Indian, or the Indian was affected by an act of a citizen of the United States.

Now, you are to pass upon that fact just like you are to pass upon any other fact. In the first place it is recognized by the Executive Department of the Government of the United States now that these tribes or nations of Indians, the Cherokees and others, have a local government of their own; they have what is called an autonomy of their own. And that being their situation, that the question as to who is a citizen of that country is a question that they have a right to settle finally, and it is a question that they are to adjudicate and pass upon finally as far as it may affect the legal rights of that nation or its members. Consequently it becomes a material fact in the investigation of a case of this character, when one of the issues involved is as to whether the party is a citizen of that country or not, to ascertain whether he had been recognized legally by the authorities of that country as a citizen thereof. If he had not, that is prima facie evidence for a conclusion that he was not a citizen of that country, because until that is done we have a right to take it for granted that he stands outside of the pale of that nation. He might still say he was a citizen, although they had not recognized him, but their failure to recognize him as a citizen is a competent fact to be taken into consideration by you in passing upon that question. Then you are to consider another fact. You are to consider as to where he had been living. Now, this court charges the jury that if a man is an Indian by blood, and if
261 he goes out and lives among the white people, abandons his country, lives among white people who are citizens of the United States, and performs the duty belonging to citizenship, or exercises the rights that pertain thereto, that that is evidence upon his part of a purpose to abandon the relation that he may have to that country and to its people, and he may abandon it in that way so as to cause him to become a jurisdictional citizen of the U. S. If he is simply out temporarily, and is not subject to the duties of citizenship—that is, duties of citizenship that are placed upon the citizen of a State or of the nation—and he does not exercise any of the rights belonging thereto, he then may retain his Indian status, he may still be an Indian; but the fact that he is living out of that country, lives away from that people, and lives among the people of the United States, is a fact you may take into account as a fact going to show that he was a citizen of the United States. This jurisdiction conferred by the law upon the courts of the United States to try for the commission of crimes in the Indian country contains, as I have already told you, an exception, which

is that if a crime is committed by one Indian upon another—that is a proviso to the section—if the Government shows a state of case where there has been no recognition, if the Government shows a state of case where a man, as far as the evidence shows, has constantly lived out of that country, and came into it at a late period, you have a right to take these facts into consideration as establishing a state of case that would prove the proposition sufficiently until it is overthrown by evidence establishing a state of case that is different from the allegation contained in the indictment. You have a right, and it is your duty, to take into consideration upon this proposition all the facts and circumstances; the fact that if he was
262 related there that his relatives took no interest in him when killed; the fact that if he was connected by the ties of blood with that people that that was manifested or made known at the time of the killing or since that time, and all these usual, probable, and natural circumstances that would exist if the proposition is true that he was an Indian, and that would surround him as a member of that nation.

You, in other words, are to pass upon the question as to whether or not the fact that he was an Indian is a true fact that exists, or whether it is a mere afterthought in this case; and in passing upon that, as in passing upon other propositions in the case touching the guilt or innocence of this defendant, you have a right to take into consideration his own conduct in the premises; his own actions in the premises. There is no evidence here going to show that he was fleeing from justice, as far as it may be asserted by the courts in the Indian Territory in this case. There is not a syllable of testimony that points in that direction. And if he become a fugitive from justice because of any desire to not appear in this tribunal it becomes material to take into account and contemplate the matter as to whether it would be natural or reasonable that he would become a fugitive from justice for ten years from a trial in this tribunal if the tribunal—and he knew it—had no jurisdiction of the case. I say, as I said to you in the beginning, that upon all these propositions that may be asserted or contradicted you are to pass upon them as reasonable men; you are to pass upon their reasonableness and their probability and their naturalness. If they are not reasonable, in your judgment as men of sense, men of experience, men of observation in life; if the assertion of a proposition is not a reason-
263 able assertion; if it does not seem to be consistent with what would be the action of a man situated as was the defendant at the time, you have a right to take that into consideration in passing upon the truth or falsity of the proposition. You have a right to do it upon this one, just as you have upon all the propositions in this case. It is your duty to find this proposition or jurisdiction, as you are to find the other propositions, beyond a reasonable doubt. If from these facts and these circumstances you find it beyond a reasonable doubt, then you may proceed to investigate the merits of this case. If you can not find it to that extent the case must fall to the ground, because then, no matter what might be the state of case as to whether the defendant is guilty or innocent of a crime, it would not be within your province or mine to investigate it upon the merits, and you would not be authorized to find a verdict upon the merits. But if that proposition is sufficiently established in your minds, then you proceed to investigate whether a crime was committed here or not.

The contention in this case is not that the defendant did not do the killing, but the proposition, as asserted by him is that, although he did do the killing, that he committed no crime when he committed it. What are the things necessary to be found? First, that Gentry is dead. That is the first thing after we have passed upon the question of jurisdiction. There is no contention over the fact of his death. The implied effect of a plea of justification or self-defense is that the party committed the act charged—that is, that he killed the one alleged to have been killed. Then you may lay that proposition aside as one proven in the case; you
264 may take it as established in the case. Then you are to pass upon the further proposition that Gentry died of violence of the kind named in the indictment. It is charged that he was shot with a gun. The proof shows that the weapon used was what is called a pistol; but, in the law, that is a gun, and you may have an allegation that the killing was done with a gun, and if the proof shows it was done with a pistol that allegation is satisfied. In contemplation of law guns are pistols and pistols are guns; they are kindred weapons; they produce effects in the same way; they produce like effects. You can charge a man with having cut another with an axe and you may show that he was cut with a knife or any other sharp instrument. So, in this case the charge is that the defendant killed Gentry with a gun; and if the proof shows that he did it with a pistol, that establishes the allegation; that proves it. Now, it is not only necessary to show that he shot him with a gun or a pistol, but also that he died from the effect of the wound so inflicted by the defendant. Of course, that is only inferential at best. We can only find by inference that a man dies from an injury. But if you take a man and he was in good health and an injury was received, and it was a vital injury, or a number of injuries of that character, and the man fell dead, or died finally, then reasonable men would conclude from such facts—and you as reasonable men are authorized to conclude from such facts—that Gentry died from the effects of a pistol shot received in his body. If you find that to be the case, then you would be authorized to find that the defendant killed him by shooting him with a pistol.

We have now gotten along to where it becomes necessary to find
265 what condition of mind the defendant was in when he did this act of shooting; in other words, we are called upon to find whether he did it willfully and with malice aforethought. If he did the act of shooting willfully and with malice aforethought, because of the intimate connection between an act of that kind and the result called death, the law says that he produced the death willfully and with malice aforethought. Therefore, in ascertaining this condition or these conditions of mind which go to characterize an act it is only necessary to find what was the condition of the mind of the man when he did the deadly act, when he performed the deadly act, when he fired the deadly missile into the body of Gentry. If that act of firing was done willfully and done with malice aforethought then he killed Gentry having the same condition of mind, because the law holds this man, as it holds all other men, to have intended the necessary, natural or probable consequences of his acts. And when he does an act that is willful, and characterized by malice aforethought, the consequence has the same characteristic, has the same attributes connected with it as the act has.

Now, we must go to the law to find the meaning of these expressions, because the law defines them. To secure greater certainty, and therefore to secure better enforcement of its provisions, that life may be secure and safe, by all men being promptly punished when their crime is correctly and fully ascertained, it defines what the crime is, it tells us what enters into it, what goes to make it up, and by that definition of it we are governed. Then, in addition to the things I have named in this case, the fact of the death of James Gentry, that he died by violence of the kind named in the indictment, and violence of the defendant, or an act that had this violence connected with it as done by the defendant, that that was
266 the cause of his death, and that that violence grew out of the condition of mind known as willful and with malice aforethought.

Now, of course, we are governed by the definitions of these expressions, as the law gives them to us, and I may remark in this connection that if this killing was done willfully, and there was not in it anything which justified it under the law, or which reduced the grade of the killing from the higher crime to one of less grade known as manslaughter, from the fact that it was done willfully you will find that it was done with malice aforethought, because every willful killing done without just cause or in the absence of mitigating facts is a killing with malice aforethought; for, as you will ascertain presently, one of the most comprehensive definitions of that phrase is the doing of a wrongful act without just cause or excuse which produces death in such a way as to show that it was done in the absence of justifying cause, or in the absence of mitigating facts. A man shoots another down; there is nothing to justify that killing. There is nothing to reduce the grade of it. From the very fact of his shooting the man down you have a state of case that would authorize you to say it was done willfully and with malice aforethought, and you would find it was done with malice aforethought when you found it was done willfully; and you would find it was done willfully in the only way you could find it, by the character of the act as done, by the way the party did it, such as drawing, presenting, and firing a deadly weapon. That is all that a reasonable mind would want to show, that it was case of murder. That is all that your minds need or require by the law when you are in the jury box and administering the law as a citizen of the country, and
267 in the capacity of jurymen. Now let us see what is the meaning of the word "willful."

"The word 'willful,' as used in connection with a charge of murder, such as is preferred in this indictment against this defendant, means an intentional killing and not an accidental killing. It means an act which results in death, which is intentionally done and one that is not accidentally done."

I want to remark to you in this connection that there are but two conditions growing out of human conduct, and one of them is a condition which goes to show that what transpires was what the law calls an accident, and the other is a condition to which the law attaches willfulness or intent. Now, I define to you what is meant by an accident that you may the better understand what is meant by a willful act, because it is not only the act which has behind it a specific intent, a specific purpose, that is willful, but willfulness is attached by the law to that which is not an accident. It may grow out of negligence; it may spring out of negligent conduct. It

is not claimed on either side in this case, nor could it be, truthfully, that there was anything like negligence in the case; but that you may the better understand and comprehend the meaning of the word willful as the law fixes that meaning, I give you the definition of the word "accident."

"There is a great difference as the law recognizes between that which is an accident and that which is intentional. The law fastens intent to everything that is not an accident. Every act that produces death which is outside of the definition of the word 'accident' is intentional in the law, whether it grows out of a specific design to take life, or whether
268 it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which, from its nature and the way it is executed, as a natural and probable and reasonable result, death may ensue from the execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence."

Now, you might take a man who is handling a dangerous or deadly weapon, such as a gun or pistol, and if he would exercise the care that the law exacts of him to prevent any injury to another, and yet an injury transpired, he would not be responsible for anything, because there is nothing to which you can attach willfullness; and in a case of that kind, because of the character of the weapon used or handled the law exacts of him the very highest possible care that he can exercise. The care exacted by the law is always proportionate to the danger to others, and when a man goes outside of that and does n't exercise that care, he becomes guilty of an act that is willful, in the law. When a man exercises that amount of legal care, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally, or reasonably, or probably, from its nature and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce
269 a certain result, whenever the act is done intentionally the result is intentional. For example, if a man draws a pistol upon another, presents it, and fires it at him. You ascertain, if you are called upon to investigate a case of that kind, whether or not he did that firing intentionally. How could you tell that? He has not told you beforehand that he intended to fire. He has not said a word, in the case I have put to you. How do you know that the act is intentional? Why, you go to the actions of the man, as a matter of course, just as you do in the everyday affairs of life. There is no straining after a thing required, no great amount of effort or exertion required on the part of jurymen; it is simply the performance of what they do every day of their lives if the same state of case is presented to them.

You, for example, see a man present a pistol at another; he fires it; he pulls the trigger. You know that a pistol is a deadly thing; you know it is made for the purpose of taking life, and you know it is inanimate; you know it has no vitality of itself; you know it is a mere machine; it must be acted upon. And the very fact that it must be acted upon to

produce a deadly result is a fact that enables us to tell whether the party who used it is using it intentionally. The fact of the drawing, presentation, and firing of it shows the intentional use of it, because these are facts that men in the every-day affairs of life consider as sufficient to prove that fact, to produce that conclusion. When you see a man in that attitude towards another, and you see him fire, you conclude from that circumstance, or from this concurrence of circumstances in the shape of drawing, presenting, and firing the pistol, that he is doing a willful act. That is the way you arrive at it. That is the reasonable way to arrive
270 at it, and you conclude from that condition that it is not an accident that is transpiring, but it is something that is intentional, that he who does it intentionally does an intentional act; and further than that you are authorized to go, further than that because of the character of that weapon and the known results, results known to he who thus uses it, that which follows such use of it. The law gives you authority, and the law of logic as well as the law of the land says it is your duty to find from a state of case of that character not only that he intended to do that act willfully, but he intended whatever result follows from that act. If death follows from it it follows as a matter of course as a natural and reasonable consequence that usually or probably or naturally may occur from an act of that kind, and, therefore, from facts of that character you have a right to infer that he willed the death that he produced; that the deadly result is a willful result upon his part as far as he was concerned. You now see the method of finding a proposition of that kind. When you come to look at it in the light of these rules that we may apply to find it it becomes easy, it becomes simple, it becomes easily ascertained. We generally recognize the fact that a gun is a deadly weapon, and that if used in a certain way it will take life, or it will jeopardise life. While that is so, it is inanimate; it has no will power of itself, and therefore common observation produces the conclusion that when a man presents it at you or any human being and fires it, and death ensues as a consequence from the act of drawing, presenting, and firing, that the man intended that result. That is exactly the conclusio : you would come to if you would see an occurrence of that kind done in that way, and it is exactly the conclusion you are authorized to
271 come to as reasonable men in the jury box when you have a case illustrated by such facts as these; and when such evidence is presented before you you have a right to come to the same rational conclusion that you would come to as reasonable men if you would see a transaction of that kind with your own eyes. You have not seen this transaction occur, but you have applied one of the senses to it; you have heard how it occurred, and you have a right to come to the same conclusion, and just as intelligently and just as reasonably as you would if you had witnessed the occurrence yourself.

"If an act of the character named produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now, intent is something that can only be found by inference. It can only be found from the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law

holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or a pistol at another and shoots it at him, the law says that he intends to kill him, because the killing is a result that is natural or probable or reasonable."

Where do you go to get a foundation for a conclusion of that kind?

You go to exactly what you would as reasonable men, and what
272 all other reasonable men do when such facts are presented, and you would conclude that the party intended the death of the man he shot at. You could not help but arrive at that conclusion. You may sometimes attempt to resist such a conclusion, but the truth is of such power it will find its way to the minds of reasonable men, it will drive out all prejudices, all passions from our minds, and it will produce a conclusion that is warranted by the truth, fight against it though we will.

"A word in this connection as to how you may find that the act was willfully done.

"The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man, who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the nece-sary, natural, and probable consequences of his own act. If one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from that act of shooting is that he intended to destroy such person's life.

"Now, shooting at a man is the doing of an act which has a direct tendency, ordinarily, to destroy his life, and the natural conclusion from the act of shooting is that he intended to destroy such person's life.

"So, if the direct tendency of the willful act is to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used

with violence upon the person of another, as this has a tendency to
273 destroy life, or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm is a necessary conclusion from the act.

"You take the act done; now, your common observation teaches you that a gun or pistol fired at another within shooting distance of him will put his life in danger; it may probably de-troy it." For that reason, because of the character of an act of that kind, all you have to do to find whether the party intentionally or wilfully took the life of another is to find out whether he fired at him willfully or intentionally, because of the deadly character of an act of that kind, and because of the probable consequences that may follow or which do usually follow from it. From that state of case alone you may infer that the party intentionally or willfully killed the party he is charged with killing. In this case, if the defendant presented his pistol and fired it in such a way as to take the life of James Gentry, from the presentation and firing of that pistol it would be your duty to infer as reasonable men in the performance of your duties under the law that he willfully took the life of James Gentry.

That is the first proposition having relation to the condition of mind that you are to ascertain to find out whether this killing is a killing that can be denominated or characterised as murder.

The other proposition is one that you are to find, and it is the one which distinguishes the crime of murder from any other crime growing out of the taking of human life, or from any other homicide—any other state of case where homicide is committed. You will understand
274 that under the law of the United States there are but three conditions growing out of the taking of human life. There is another condition that may grow out of an attempt upon life, but if the attempt is conclusive and life has been taken, that becomes merged in the act which results in the death of the other party, and if death ensues the law commands you as the triers of the case to carefully, deliberately and dispassionately look to the facts to find first the truth, and then to find what that truth shows. You can only know that by having these characteristics that go to make up the crimes under the law of the United States. Every homicide under the law of the United States is either murder or manslaughter, or it is excuseable under the law. It is one or the other. Now, excuseable homicide may possess this characteristic I have given you known as willfully. A man shoots another in self-defense, and in doing that he contemplates the situation, acts upon it, showing that he wills what he does; that he drew his gun or pistol and used the deadly weapon in such a way as to take life; and that possesses this attribute as well as the crime of murder. So does a case that is known to the law as voluntary manslaughter, where a man acts willfully, where he uses his deadly weapon in a willful way, and he consequently takes life willfully if life is destroyed by his act. But the trait which distinguishes murder from any other kind of killing is known as malice aforethought.

Now, in the examination of this question, of this proposition confronting us, if we can find that it is not a case of self-defense, and if we can not find, secondly, it is a case of manslaughter, we are necessarily brought to the conclusion that it is a case of murder, because it must be one of
275 those three. Hence, in defining these different propositions that go to make up a case of murder, or a case of manslaughter, or a case of self-defense, it is necessary that we should note with accuracy and with care the definitions given to these conditions by the law of the land. I remark again that the distinguishing trait that goes to make up murder is the fact that it is done with malice aforethought, but, I repeat again, if there is eliminated from the case that condition which could be defined as a state of self-defense, or that condition which could be defined as a state of manslaughter, the proof which shows that the killing was done willfully would show that it was done with malice aforethought, because it would show that it was the doing of an unlawful act without just cause or excuse, or in the absence of mitigating circumstances, and that is one of the definitions of malice aforethought. I repeat this definition in various forms to you that you may the better comprehend it, and that you may the better understand it. It is defined in a general way by the law to be the doing of a wrongful act without just cause or excuse and in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party a right to defend against it, the right to do it upon the ground of

self-defense, or that it was done in the absence of mitigating circumstances. Again, the law defines it as the doing of a wrongful act without just cause or excuse and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent on mischief. The law says it can only be found by circumstances. That is necessarily so, because it is a condition of the mind; it is a
276 mental condition, and we can not tell what it is if we can not apply what is shown to us by the light of circumstances, the light of things standing around the occurrence that go to characterize it. Here we are to bring to bear our observations in life; we are to bring to bear our gathered wisdom that enables us to know by the light of these circumstances what the character of the act is, and we are enabled in this way to characterize the act. It is like the element of willfulness—it is a condition of the mind; it is something which exists in the mind; and whenever there is a thing which exists in the mind which is necessary to be found to make up the elements of a case, because we can not get into that mind to know what is going on there at a given time, and because we could not tell what was transpiring there if we could get into it, we must learn it in some other way; there must be some rational way by which we must learn it; some way that rational men would adopt, because we are not authorized to adopt any other method than that which is reasonable in arriving at conclusions. There is a reasonable way, and that is the way that the law recognizes as the proper way by which men may arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done; whether it was an innocent or criminal act, and if it was a criminal act, what was the nature of that criminal act.

Again, the law says, that malice aforethought is the grand criterion which distinguishes murder from other homicides; and it is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act.

280 A man may kill another because he has got some animosity against him, but in looking for the character of the motive or animosity you need never expect to find that it was in proportion to the act done, because you will never find it. Men sometimes kill for the most trifling insult, or the most trifling indignity, and sometimes that indignity is only imaginary, while other men, who have been under moral restraint, who are obedient to the law of the land, who have been so trained that they take a proper view of their duties to their fellow-men, would not even be insulted by such a thing. A man, I say, may kill because of these, or he may kill from what the law calls general malevolence, because he is reckless of life, because he does not care whether his fellow-men live or die. That often transpires where a man who is an entire stranger to another shoots him down; kills him in cold blood; shoots him down in a way that we would infer from the act that it was done in such a way as that it was murder. Nobody would hesitate for a moment to find that he committed murder. How do we conclude that? It is exactly like we would come to the same conclusion if we knew that fact of

shooting without good cause when a lawless or desperate man would fire his pistol at another when he had no cause, and we would come to that conclusion almost instinctively from the ch'racter of the act done and the way he did it, and the very motivelessness of the act; the very fact that the party had done nothing to even excite him or aggravate him. The law recognizes that an act of that kind is evidence of a wicked, depraved, and malignant heart; it arises from a general purpose that a party may entertain to do a wicked act that may result in death. And if a
281 man kill another suddenly without any or without a considerable provocation the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause.

"Malice is an intention to do bodily harm; a formed design to do mischief. It has also been defined as a deliberate attempt to kill. A man forms a design to do bodily harm that may result in death, and he executes that design and does produce death; that is a case that has malice aforethought attached to it, because he has no right to form a design of that kind and execute it. He does not form a design of that kind when he stands upon the defensive. The motive that prompts him then is to defend himself, but when he contemplates a purpose to take another's life without its being necessary to defend himself, he can not set up anything even in mitigation of an act of that kind, because this element of murder known as malice aforethought exists which grows out of a state of premeditation, a state of case where he thinks of it beforehand, and if he thinks of killing beforehand and kills in such a way as that the act of killing cannot be mitigated or justified; the fact that he thought of it beforehand, the fact that he prepared to do it beforehand shows that it was done deliberately; that it w's done with premeditation, and it consequently grew out of a wicked condition of mind that entertained a purpose to produce a deadly result without just cause or excuse or in the absence of mitigating facts or circumstances.

"When a man forms a deliberate intent to kill another, that is a malicious killing." "It does not necessarily import any special malevo-
282 lence towards the individual slain, for it also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation. Therefore there must logically be a period of prior consideration"—that is, prior consideration of the purpose to do the act which produced death—"but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as do the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a life time pass in a few minutes before their mental vision. Though' is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

"Malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act

is done without just cause or excuse, and in the absence of mitigating circumstances which produces death, it is murder, whether it grows out of special spite or animosity, or a specific design to take life, or the purpose to do some other act of a wicked and malignant and criminal nature, which because of its nature and the way it is done a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse, which results in murder. It evinces
283 a formed design to do such mischief as may deprive a fellow-being of life.

"Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

"You can not tell the condition of the mind by direct proof, bearing in mind the distinction between these two kinds of evidence positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for."

The very thing that you are hunting for is the condition of the mind. Now, you can not have that condition placed before you by positive evidence, by the statements of people who saw it. It is not capable of being seen; therefore, if you are to know it at all you must know it in some other way; you must get at it by the light of circumstances; you must know it by the means of things that stand around the act done, which go to characterize the act; which go to show the condition of the mind which prompted that act which brought it into existence. This is the usual way of getting at 't, and it is a reasonable way; it is a way that reasonable men adopt. It is a way that you may adopt when you are sitting in the jury box and are called upon to find a mental condition at a given time, and as you are called upon to find the condition of the mind of this defendant at the time he fired into the body of Gentry. You are required to find whether or not the mind of the defendant in the light of the law was characterized by such a condition as to show that the act he did was done willfully and done with malice aforethought.

284 Now, as the law says, and as I have already told you, there never can be presented to you direct evidence of it—that is, of what was the intent of the man's heart, or the condition of his mind at the time that he did the act. He is the only possible direct witness to that, and if he meant so to testify he would plead guilty—that is to say, if he meant to testify that he was prompted by a spirit of willfulness and of malice aforethought when he did the killing. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind and the feelings of his heart, by a careful study of the acts which he performs and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text-writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express.

"It can not be demonstrated as express.

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result, is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed for any
285 definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases and by text-writers, that malice is to be inferred from the use of a deadly weapon."

That ought to be modified, in my judgment, so that it would be that it is not to be inferred from the use of a deadly weapon; but it is to be inferred from the use of a deadly weapon when there is an absence from the case of that which would give the party the right to use it under the law of self-defense, or that would give him the right to use it, and then ask that his actions be mitigated or reduced in grade from murder to manslaughter. If both of the conditions are eliminated from the case, and he uses a deadly weapon so as to produce death, in the language of the proposition that I have already given to you, you may, from the use of such a weapon and in that way, under such circumstances, infer that the act of killing was done with malice aforethought, because it fills to the utter most extent one of the definitions of malice aforethought—the doing of a wrongful illegal act which kills, without just cause or excuse or in the absence of mitigating facts. If there is an absence from the killing, a case of self-defense that we can only know by the light of the truth as we find it and by the light of the law defining that state of case, and there is an absence from the case of that other condition which is denominated as a crime, and which occupies a midway position between the crime of murder and a case of excusable homicide, called a state of case named man-
286 slaughter—I say if that condition is out as well as the other, there is nothing in the case but a case of murder, because the facts showing the state of case existing would necessarily show the doing of a wrongful act without just cause or excuse, or in the absence of that which would justify or mitigate.

Malice is to be inferred from the attendant circumstances which surround the transaction, and the jury have a right and it is their duty to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.

Anything that shows deliberation, anything that shows premeditation, a premeditated purpose to do a wicked or willful act that might result in death, is evidence that may be considered by the jury, going to show the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly existed

in the mind of the parties or party who killed, or the purpose to do a willful act that might result in death is shown by the action of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought. Therefore, there is an absence from the case of that state of facts which goes to show that the party had a right to do what he did do. The law lays it down that
287 the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party, entering upon whatever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful way, the fact of so preparing the weapon and selecting it for use in that unlawful and wicked way, in a way not authorized by the law, in a way that the law would not mitigate the act if done—I say, the fact of the selection and preparation of a deadly weapon and the use of it in a deadly way, after he has so selected it and prepared it, shows the existence of a state of premeditation, shows that he thought of the purpose to kill wrongfully and unlawfully before he executed it, and when that state of case exists there is a condition of malice aforethought which goes to characterise the act as done. It shows the purpose to do a wrongful act without just cause or excuse. You may go to the killing. You ascertain how the killing was produced; you ascertain the character of the weapon used; you find out whether it was deliberately and willfully used at the time. You find out whether it was used under such circumstances or in such a way as that he didn't have the right under the law to use it, or that he would not have a right under the law to ask that the result produced by the use of it be classified as a result of less criminality than murder; and whenever you find that he willfully and intentionally selected and used a deadly weapon under such circumstances you necessarily find the case was murder.

I have now undertaken to give you the definition of both these expressions which enter into this crime, and I have told you that you can only
288 find these characteristics of these crimes by the light of circumstances. That is the only way you can get at it, because it is a mental condition; it is a condition of the mind. You have a right to go to circumstances and it is your duty to take them into account to see whether these characteristics of the crime called murder exist as characteristics of the act of which the defendant is charged in this indictment, and if you do he is guilty of murder.

It is claimed for the defendant that he is not guilty of any crime, although he killed the man; that he took human life, deprived a man of his life, and yet he is guilty of no crime. Now, we are to ascertain whether that is the state of case or not. We are to find out first when a man can kill another and not be guilty of any crime. Then we are to see whether the evidence as we may find it to be true fits that state of case, whether it shows that state of case as existing here. It is necessary, in order to ascertain this properly, that we go to the law of self-defense to find out what is meant by it. We would naturally have a general idea of what the law of self-defense means; we would instinctively be brought to the conclusion that one man could not kill another unless his life was in such peril as that it was necessary for him to do that act in order to avoid death or great bodily harm to himself, when he was in the right. That is the instinctive

conclusion we come to without ever going to the legal definition of the law of self-defense. It is a consciousness that is planted in the heart and mind of every man, his knowledge of right and wrong, which teaches him that for a slight injury, for mere words, or for anything that does not then and there throw such peril around the life of the party that slays or threaten him with great bodily harm as that he can not escape from
that peril except by taking the life of the party who was the
289 author of that peril. I say we may come to such conclusion from
our knowledge of right and wrong implanted in our hearts and minds by the laws of nature. Yet, for certainty that we may not be lead astray by the circumstances that surround the case, it is necessary that we should go to the law and find out what this definition is of the law of self-defense, find out when it says that we may slay our fellow man; and it is by the definition of the right as given by the law that we are to be governed. This is the right that exists that is som'times called the law of necessity, a right that must exist from necessity. It is the necessity of the case that produces the right as it may be in the hands of a particular individual. If the necessity is absent we can not stretch it, as a rubber blanket, to cover a case and say we stood upon the law of self-defense. We can only stand upon it when the facts surrounding us give us the right to stand upon it. We can not place ourselves there; it is the law that places us there. It is the law of the land that gives us the right to stand there. We can not place ourselves there because of a bare state of fear that may control us which may be upon our minds, and which may be operating upon us at the time, but there must be that condition which is expressly pointed out by the law as a condition that will give us the right to slay our fellows or to act in the position of judge, jury, and executioner all at the same time—to determine what the law is, find out what the facts are at the time, make an application of that law to these facts, ascertain the result in the shape of a verdict, enter up a judgment upon that verdict, and
then act as a marshal or a sheriff and execute the man all at the same
290 time. That is a great right and a grave responsibility; that is a
concentration of mighty power in the hands of any individual. Mighty as it may be, great as it may be, and responsible as it may be, it is still a right that exists in the hands of a citizen, to be given him when he is entitled to it, and in no other case.

Now, we have to go to the law to see what that right is. There are but two propositions in this law of self-defense: Where the danger that he may act against is real and actual, and the other is a state of case where the danger may not be real and actual. And, although the propositions are perfect, they are comprehensive; there are a great many things that enter into them, and they are to be closely adhered to by the jury in administering this law of self-defense; in ascertaining whether or not the case exists to which it can be applied. Now, what is the very first proposition we start with under this law? That the party who invokes it must have been doing at the time of the killing that which he had a right to do; or, at the time that he was attacked by the party slain he was doing that which he had a right to do. If he was, and was attacked by another under circumstances which denoted an intention to take away his life, or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life

or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, that is the first rule, to be applied to a real or actual condition, and a condition, too, that imperils the life of the party, or put his body in danger of receiving great injury—in this case, under this proposition, at the time that he shot Gentry the life of Famous Smith, the defendant, must have been in deadly peril, or he must have been in danger of receiving enormous bodily harm, which must have sprung from the actions of
291 the party at that time; or, in other words, Gentry must have made such an attack upon him as indicated from the way it was made, fr' from the character of that attack, that he intended then and there to take away the life of the defendant, or to inflict upon him some enormous bodily harm.

And what is meant by that? Not a mere break of the skin, but some harm that might produce death when that harm was inflicted upon the body. If Gentry was doing an act of that kind or was about to do it, to do it so soon as that there could not be any escape from the result that he was then contemplating, the defendant may then lawfully kill Gentry. When, anyhow? Just because he had done that? No, not at all. It does not say that. That is not the law. It says, provided he used all the means in his power to otherwise save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. That is what must ensue in order to give him the right under this proposition to exert this law of self-defense. The danger from Gentry may be deadly; it may be an attack that the defendant did not bring upon himself, but it must be deadly, and it must be an attack which, from its nature, from its character, from the way that the party is seeking to execute it, that it would indicate to the mind of a reasonable man situated as was the defendant, that the purpose of Gentry was then and there deadly or to do great bodily harm. Now, if he could not escape from that danger by getting out of the way of it, or he could not escape from it by the use of less violence than he did use, he may use deadly violence, but if he could have avoided it it is his duty to avoid it, but if he could not have avoided tnat by the exercise
292 of reasonable care, or it he could not have avoided that by the use of less violence than he did use he would have a right to take his life. Now, of course you know without my telling you that before you can apply this rule you must find a state of case to which it can be applied, and you are to look to the reasonableness and probability and consistency of these facts to see whether that was the state of case or not. If it was not, then it is the invocation of false testimony; it is the invocation of a false condition to cover up crime, and that is all there is to it. If that was not the state of case, or the state of case did not exist as denominated under this other proposition, and that state of case is undertaken to be sustained by testimony, by the statement of pretended facts, it would necessarily follow that it would be the invocation of false facts, and such an invocation as that, of that kind of testimony, instead of doing the party who calls upon it any good, is a foundation for a presumption against him, because the law says that he who has the truth upon his side, he who has innocence upon his side, does not fly to falsehood; he does not create a

state of case where he relies upon a set of fictitious facts. He depends upon that which is his best friend, his best servitor, the truth, to protect him.

Now, I repeat this again, that you may understand it: He who is in the lawful pursuit of his business—that is, doing what he had a right to do at the time—is attacked by another under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or to prevent the intended harm,
such as retreating as far as he can, or disabling his adversary with-
293 out killing him, if it be in his power. If Gentry attacked this
defendant in such a way as to indicate from the nature of that attack a deadly purpose upon his part, or a purpose to do enormous bodily harm, and was then and there engaged in executing that purpose, and there was no way of avoiding it by getting out of the way of it, by retreating when he was on horseback, or by avoiding the consequences by the exercise of less violence than shooting him to death, and he repeatedly shot at him when he could have crippled his horse—if that was the state of case, and he could have saved his own life by the exercise of less violence than deadly violence, he is required to do that, under this law. That is what it says.

Now, there is another proposition to the law of self-defense. Where, from the nature of the attack there is reasonable ground to believe there is a design to destroy his life or commit any felony upon his person the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. Now, you naturally inquire what that rule means; whether one man if he thinks there is danger can kill and be excused in it. Let us see how uncertain that rule would be. How many men when brought into courts of justice for trial would not say that they thought they had a right to kill? How much security would there be from the man of crime if such was the case? The law would loose its protecting power and would become a mockery, a delusion, and a sham, and by all contemned and by all despised instead of worshipped. The law does not consist of nonsense; it is the perfection of wisdom. It is founded upon that which is right. Therefore, this rule does not amount
to anything if it is regarded in that light. It means simply this:
294 That, although the state of facts which existed may not have evinced
a real purpose to take life, or do great bodily harm, yet they must seem to be of that character when viewed by reasonable men, situated as a person may be in a given case. There must be attending this proposition some overt demonstration, some act of apparent violence by the party who is slain, because we can not conceive that a man may have a purpose to kill us and kill him for that and say that we thought there was danger.

The evidence of danger must grow out of a condition that then and there exists in the shape of an act or acts of violence being done by the party, because the law says that when from the nature of the attack, from the character of the act done, etc. It does not spring from a state of case where a man can say that he thought there was danger to his life. An example given is that if A shoots at B, and he is preparing to shoot again, and B looks at the situation, he looks at the act as done by A, and A shoots just like a man does when he goes to kill, he holds the gun in the

same way, it makes the same character or report, and he is preparing to repeat the act of violence, or of apparent violence, just as a man would who had a purpose to kill, and there are no other means to avoid the deadly act forced upon him than killing him the law says he would have a right to do that, although it might turn out afterwards that A had no deadly purpose; that he could not execute a deadly purpose; that he was simply testing the courage of his friend by a foolish act, yet the circumstances were all of a character that would ordinarily lead a man to believe that the danger was deadly, and in a case of that kind, although the danger may turn out not to be actual or real, there is existing that which seems to be a state of facts that would lead any ordi-
295 nary man to believe that it was real and deadly in its character. Now, suppose that B shoots A when he was not presenting and firing any gun at him, but simply because he had it in his mind that A might kill him; that A had a deadly purpose against him? He would in that case be guilty of murder. There would not be anything in a case of that kind to even mitigate his crime. And that is just the different between these two propositions. In this last one there must be in existence that which seems to be a deadly attack. It must be an act of violence which seems to be deadly, or that a reasonable man situated as a person may be at a given time would infer was deadly, and that that deadly danger could not be turned aside except by doing as he did do. He could not turn it aside by getting out of the way of it, or by executing some act upon A that would be less deadly in its character than the one executed. When that is not the case he is justified in acting under this state of apparent danger the same as though the danger was actual and real; but there must be that in existence which would lead a reasonable person to believe it was real and actual. Now, these are the two propositions which make up this law of self-defense. I have given you two conditions; one is that which marks out the existence of murder, and the other is that which marks out a state of case where there is no crime. There is a condition between them called manslaughter. I do not know what your view of this case is. You may entertain a view when you have passed upon all the evidence and examined it thoroughly that there is no crime here such as I am about to define to you. If that should be the case, that you may the better understand the other condition, it is proper that you
296 should know what the law contemplates or defines as a condition that is named manslaughter.

And again, there may be in your judgment a state of case which would authorize you to say that manslaughter exists here. Manslaughter, under the law of the United States, means the willful and unlawful killing of a human being in such a way as to show that there was an entire absence from such killing of malice aforethought. A killing that is done willfully, that is done unlawfully, or wrongfully, and that there is not attending it that which is a characteristic of murder known as malice aforethought, is defined by the law as manslaughter. If that does not exists, and the state of self-defense does not exist, then necessarily there exists a case of murder. If murder does not exist, and manslaughter does not exist, there necessarily exists a state of self-defense that is excuseable in the law. Now, that is the definition of manslaughter. Voluntary manslaughter is characterized by willfulness as well as murder, but it is dis-

tinguished from the crime of murder by the fact that there is an entire absence of such facts and circumstances as would show the characteristic of murder known as malice aforethought. The law says that voluntary manslaughter usually grows out of a state of case where there is an affray, where two men, for example, are engaged in a fist and skull fight, where neither of them with the means they start in to use and are using at the time are capable of inflicting deadly injury, but it is an ordinry fight as men ordinarily fight. If one of them under such circumstances should suddenly, without any previous preparation of the same, use a deadly weapon so as to take the life of the other, the law would mitigate that because of the condition of the mind of the party, which to some extent was caused by the act of the other party. It commiserates his
297 condition and contemplates that he did not do the act while his mind was in that state of deliberation where he was capable of premeditation; but, in a case of that kind, if he prepares a weapon with the determination to use it if occasion offers, he may be in an affray—may be engaged in an ordinary fight with his adversary—the preparation of the weapon beforehand, together with the contemplation to use it in a deadly way, would put him in such an attitude as that his act of killing would be characterized as murder, and could be characterized in no other way, because there is deliberation, there is a contemplated purpose to do a deadly act, there is a design upon his part to take the life of the party if occasion offers, and that is not a state of case which can produce manslaughter. Manslaughter is a condition that is produced upon the spur of the moment, when the mind of the party is in an inflamed condition, caused by the punishment it may be he is suffering at the hands of his adversary. That is what is manslaughter in the law. It is a condition that you have no right to drop down to because it may not be as agreeable to you to find murder as it is manslaughter on account of the consequences that follow. There are two things that you are to contemplate. First, you are to ascertain if a crime has been committed, and then it is your duty equally as solemn, equally as imperative, to say what the character of that crime is. If it is murder you must name it as such; and you have no discretion in the matter. If it is manslaughter you must name it as such. If it is no crime at all you must name it as such. You have no right to name it as being anything else than it is under the law. Now, that is the other condition. You are to see which one of these con-
298 ditions exist in this case. You are to see it by the light of the testimony, because you are to know the truth by the evidence offered before you.

You are to go through that evidence; you are to see which is true and which is false. Where there is this contradiction upon material parts—for instance, as to the character of these wounds, if parties had equal opportunities for observing them swear they did observe them, and one set of men give their statement as to the number of wounds and the location of these wounds, and the other set swear that it is not true, it is your solemn duty to find out the truth, because these wounds cut a very important figure in the case. They are very important factors to enable you to arrive at a conclusion in this case. So it may be upon any other questions that are before you which are necessary to be found. You are to take the evidence; you are to find out from that evidence what the truth

of the case is. Now, in this connection, if it be true that the deceased attacked this defendant in such a way as to indicate a deadly purpose upon his part, and that that attack could have been turned aside by the use of other means than these violent and deadly means used by the defendant, and he did not resort to these means when he could have done so, that would be a state of case where the law of manslaughter would apply. That would be a state of case where he would become guilty because he did not use the means at hand to protect himself from violence, but resorted to this violent method and took the life of his adversary. The law says when he does that he is guilty of manslaughter. The law says when he uses more violence than is necessary, if he could cripple his adversary, if he could overcome the purpose on his part that he was then and
299 there executing that was deadly in its nature, by doing something that fell short of taking his life, he must do it, and if he took his life when that was the state of case the law says that is manslaughter. Now, the law says again that if a man arrives at a conclusion which is a negligent conclusion, and he kills in consequence of that when it was not necessary for him to kill, the law says he would be guilty of manslaughter.

Now, let us see what either one of these conditions are, and what they require. First, under the law of self-defense, he would have the right to kill if the danger was actual and real. Under this rule that I have just given you the killing would be manslaughter. The man slain must have been making an attack of a deadly character upon this defendant. That is the first thing to find in order to reduce the grade of the crime to manslaughter. Then, that he could have turned that aside by the use of less violence than he did use. That is the second thing that is required to be found. If the man killed was not making any attack upon him, and he slew him by a violent act, by shooting him, and shot him again and again, that is murder. There is nothing else in that. But it requires to mitigate the crime that the attack under this proposition was actually and really made, and that it was a deadly attack made by the man slain, but that the defendant was at fault and become criminal because he did not use the means that the law says he should use to turn aside that deadly attack either by *me* the use of means of a less violent character than those he did use, or by getting out of the way of that danger, if it was in his power. In either state of case he would be guilty of manslaughter. Now, under the other proposition of apparent danger there must be that existing in the shape of a violent
300 act upon the part of the man slain at the time that he was slain that would give a party the right to kill him, if there was no escape from that apparent danger; but if there was means of escaping from it, either by the exercise of less violence than he did exercise or by getting out of the way of what seemed to be real danger, his duty was to do that, and he would become guilty of manslaughter then. But in this case as in the other the man killed must have been doing that which indicated a deadly purpose at the time, and the defendant becomes at fault because he did not exercise less deadly means than he did exercise when he could have done so with due regard to his own safety. In either case his offense would be mitigated to manslaughter, because of the negligent conclusion he arrived at. He must have some basis for that conclusion. He must have some foundation for it. It must not be a thing which he generates in his own mind. He must have that confronting him which would ordinarily mis-

lead a reasonable man, but it would not mislead him if he would do his duty and comprehend the facts as they existed, but that a reasonable man would be misled if he was negligent under the circumstances, and then he would be guilty of manslaughter. But in that state of case the party slain in order that the defendant may have his crime reduced to the grade of manslaughter must have been doing something that indicated a fatal purpose, though it might have been misleading in its character, though it may have led to a different conclusion if it had been correctly observed by the defendant. Now, these things are necessary to be noted with care, because sometimes jurors are misled by the assertion that a man's
301 offense is mitigated because of the act done by the other party or as to what that act is that they are to take into contemplation that is sufficient to mitigate. Under this proposition I have given you the act of deadly danger to the defendant at the hands of the man slain must have really or apparently existed, and from the existence of it the defendant must have been able to see deadly danger real or apparent growing out of actual physical violence that was being done by the party slain at the time he was slain. If he was not doing anything of this kind of course there is no foundation for the rule that would reduce the grade of this killing to manslaughter.

As I have before said, you are to see what the state of case here is by the light of this testimony as best you are able to view it. Your duty is to take into consideration all the facts and circumstances, and above all it is your duty in this case as in all others to weigh these circumstances in that reasonable and natural way that you would weigh them as thinking men, as just men, as men having sufficient ability to look at the circumstances in the light of their probability, their consistency, their naturalness, and their reasonableness. If a fact comes before you and seems improbable according to your view of it, portrays a state of case that is unnatural and unreasonable in the light of your observation or experience in life, it goes so far to weaken that fact, it goes so far to affect the character of that fact as a truthful fact. And it is these attributes of your respective minds that you are called upon to bring into action in the investigation of this case because, as I have already told you, you can scarcely conceive of a case that is ever tried in a court in this day and generation where
302 there is not that sharp, decisive conflict between the positive statements of witnesses, and how are you to get at the truth except by looking at these positive statements as to their reasonableness, their naturalness, and their consistency, and in the light of your best judgment, and in the light of your observation and your experience. If one man or one set of men come before you, and they give you statements that by your judgment are improbable and unnatural, for that reason you have a right to reject them; for that reason alone you may reject them, depending upon the extent to which this improbability or this unnaturalness goes.

Then, look at al' these circumstances. There are no positive eye witnesses to this act of killing except the defendant. He is the only positive witness that comes before you. The man who was killed is in his grave and he cannot appear before you and tell you how it was. Now, when a positive eye witness comes before you, in the light of his conduct at the time, in the light of his actions afterwards, in the light of all the facts and circumstances that you are to find to be true in this case, you are

to see whether or not he is making a true statement or a false statement. And as to other facts that may be testified to by other witnesses who come before you, in the light of the circumstances you are to weigh and determine whether these other witnesses are giving you the truth of the case—the true circumstances as they occurred. We have in a case of this kind to look at the circumstances in the case, which, of course, are motiveless. It is true they may be produced incorrectly, they may come in distorted form, but if they come in the correct way then they point either to the guilt or innocence of the accused and you may follow in the direc-
303 tion with safety that they point, because, as I have said, there is motive operating on them one way or the other; there is nothing for these inanimate circumstances to cover up or conceal. A circumstance is without interest in the result of the case; it is simply an inanimate thing that may be invoked for the purpose of eliciting the truth, for the purpose of enabling us to get at a correct conclusion in the case, and we are to weigh it in a just and discriminating and impartial way to see whether or not it sustains, or they collectively sustain, the postive statements of the only eye witness who comes before you, or whether they contradict what he says. If they contradict what he says they weaken his evidence, as you may attach credit to the circumstances which contradict him. If they corroborate what he says they strengthen his evidence, as you may attach credit to the corroborating facts.

You are to take into consideration the conduct of the defendant at the time, statements made by him as to this killing, as to the manner of it. They may be considered by you in the light of admissions, and it is necessary that I should give you the law upon that subject, showing how you are to regard such statements and such admissions.

"The jury may believe that part which charges a prisoner, and reject that which is in his favor if they see sufficient grounds for so doing."

You may take the statements that are in favor of the defendant and you may believe them if such a belief is authorized by the light of the facts and circumstances, but if not authorized in your judgment in the light of the facts and circumstances you are not to believe them,
304 because of their unreasonableness, because of their unnaturalness, because of their improbability; and you are at liberty to reject these facts and circumstances which may be in his favor and believe those which are against him.

"If what he said in his own favor is not contradicted by evidence offered by the prosecutor, or improbable in themselves, it will naturally be believed by the jury, but they are not bound to give weight to it on that account, but are at liberty to judge of it like other facts, by all the circumstances in the case."

You may then take the evidence that may weigh against the defendant and you may believe that, and you may reject that which is in his favor if you feel authorized so to do from the light of the law and the testimoney given in the case.

It is your duty to take into account the statements made by the defendant shortly after this occurrence. You are to see what his statements of how this killing occurred were at the time; you are to see that they come to you in a credible shape, in a reliable way; you are to weigh, contrast, and compare them with his statements made upon the stand as a witness,

and as an interested witness, as a witness having greater interest in the result of this case, perhaps, than anybody else. If he made statements as to this occurrence at that time coming to you in a reliable shape which contradict what he said on the stand, you have a right to consider that contradicting evidence. If the statements of a witness made at one time are inconsistent with those made at another time this inconsistency you would have a right to take into account in passing upon the truthfulness of his statements as to how this occurrence occurred as narrated by him.

It is your duty to take into consideration his conduct at that time.

305 The rule given by the law is based upon the ordinary conduct of men, and it says that if a man who has taken human life is conscious of innocence, as a rule his actions and his conduct under that consciousness of innocence will be different from the actions and conduct of a man who is conscious of guilt, who is conscious of killing without a right, of killing without authority of law. In one case, for his own vindication, for his own protection, for the good will and the estimation of his fellowmen, he seeks vindication at once; he seeks an uncovering of his act at once; he seeks an investigation of his conduct at once. In the other case, because he is fearful of the consequences, because he is conscious of his act of guilt, he becomes a fugitive, it may be from justice, he flies from a trial, he does not court investigation from his fellows, he is not willing that his case shall be presented to twelve jurymen of his country and all the facts and circumstances passed upon; and therefore the law says it is your duty to take into consideration the fact that he was a fugitive from justice, if he was such.

It becomes necessary in this connection for you to know how the law defines a state of case where a person is a fugitive from justice, whether, in order to make him a person occupying that position, he must go out of the country, whether he must flee from the exterior boundaries of the United States, or whether he can be a fugitive from justice and remain in the district where the act was done. Let us see how the law defines it. It says:

"An attempt to leave once home or residence, or known place of abode, with intent to avoid detection or punishment for some public offense against the United States."

306 That is what it means. It means to leave one's home or residence or known place of abode with intent to avoid detection or punishment for some public offense against the United States.

Again, reading from 8 Dillon, 382:

"An offendor may flee from justice, within the meaning of the statute under consideration, though he never left the limits of the district; as for example, by secretly concealing himself, or by not being usually and publicly known as being within it."

A man secret's himself when he hears of an officer coming into the country where he is living; he goes out of the country, or gets out of the way, and in this way he becomes what the law regards as a fugitive from justice. Especially is this the rule applicable to the Indian country that is thinly settled, and a man can hide in a few miles of his own home where he can keep hid, where he can have troops of friends who will give him information of the approach of the officer, and when he hears of that officer coming he may absent himself, depart from his home, and get out of the

way until the officer passes out of the community, and then come back home again. He is a fugitive from justice in a case of that kind; his conduct is of a character that indicates that he is seeking to avoid arrest. Now, I will not permit the occasion to pass without saying that no man of ordinary intelligence, that no man of ordinary information, becomes a fugitive from justice from this court unless he fears the consequences because of the act done by him, because the court, and the methods of trial before the juries here, and the impartiality and deliberation of these proceedings is well enough known to every resident of that Indian country of ordinary intelligence that that cannot be justly
307 attributed as a motive for his actions. A man comes here, and he is tried deliberately and impartially, notwithstanding the slanders and villifications that have been hurled against the court and its officers; he is heard and tried deliberately and dispassionately; the law is given in his case; it is given thoroughly, seriously, deliberately, and truly, without regard to fear of consequences from influence of any source. If a person flies from justice, keeps out of the way of the officers, even in the community where he lives, he is a fugitive from justice. This is a fact that he is called upon to explain. He may explain it; he may do it; he might get out of the way because he feared a mob, a mob of excited people, and if such was the case he would have a right to offer that; he has a right to offer any explanation that is reasonable to show that his conduct did not grow out of a dread of a trial before a jury of his country, but if he has not explained that, and explained it in a reasonable way, the fact that he was a refugee from justice, if you find it to be such, from the time of the killing until he was arrested, or a large part of that time, you have a right to take that into account against him upon the principle I have already named, that he who is conscious of innocence, who is conscious of having killed a man in self-defense, the usual rule of human conduct is that he will seek an investigation, and that he will go to where he can have that investigation, that he will seek to have a jury of his country pass upon his case to vindicate him, because they can do that; they will be anxious to do it; they would be gratified to do it, and it would be their duty to do it. On the contrary, he
308 being the only positive witness to the occurrence that can be produced in court, if he is a fugitive from justice for this time, and has not explained this conduct in any one of these ways I have enumerated, the fact of his being such a fugitive is a presumption against him which you have a right to take into consideration together with the other circumstances in this case. It becomes a circumstance in the case to be weighed by you, to be passed upon by you.

Now, the other facts and circumstances that have been offered in this case are to be weighed together with all the others that you may find to be true. Some evidence has been offered here as to threats made by the deceased. You will understand that if you find that the evidence going to show these threats was true, if you believe it, if it comes before you as natural, reasonable, and probable evidence, yet that does not give the defendant a right to kill Gentry, because you can not kill a man because he has made a threat against you, though it may be of a deadly character. There is something else must transpire before you can take his life. We can not for threats alone ask that our act of killing be reduced to man-

slaughter; it can not be reduced because of threats. You can not even slap a man in the face, you can not strike him with your fist, because of words uttered against you. You are not permitted to do that by the law. If a man uses deadly threats, and they are proven, these threats standing alone cut no figure whatever in the case, except as you take them into account when you are hunting for a motive upon the part of the defendant for killing the man. I will read to you briefly what the law says upon this question:

309 "Courts of justice everywhere agree that neither the bad character of the deceased, nor any threats he may have made, forfeits his right to life, until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

This is from the case of Prichett v. State, 22 Ala., 39.

This is a brief statement of the law as recognized everywhere, that a threat to be of any consequence must be coupled with some act of violence being done by the party at the time of the killing, which when taken into consideration together with the threat made by the party would lead a reasonable person situated as was the defendant to the conclusion that the party intended to take his life. There must be some attempt being made to execute that threat at the time he was killed. In this case Gentry must have been making some attempt at the time of the killing to execute the deadly threat, and if he was, then the defendant could take into consideration the threat made together with the act done as illustrating the act. But if the threat stands alone, if you should find that the deceased Gentry was making no demonstration, if that did not transpire as represented by the defendant, then it matters not how many threats Gentry made, and the threat would be of no consequence except as you may take it into consideration in your search for a motive for this killing upon the part of the defendant, and they may be taken into consideration in that way.

310 Now, gentlemen, you are to look at this evidence; you are to see what the truth is, because you are to base your verdict upon the truth. You are to see what facts are fabricated here. You are to see what evidence is true, and to eliminate from the case all that which is untrue. You are to use your best judgment, give it your best deliberation, and base your conviction upon what is true, rejecting what is false, and then fasten your faith to the truth in the case. If in passing upon these statements you find statements that are unreasonable from what you would find to be the conduct of persons under like circumstances, that goes against the truthfulness of such statements. You start, then, with this occurrence as portrayed by the defendant; you see how reasonable his description of this transaction is, or how unreasonable it may be, as you may conclude one way or the other. Then you see what other facts and circumstances there are that go to sustain one theory or another in the case. In other words, gather up all the facts looking towards guilt, that go to show the guilt of the defendant. If you find after having examined them all which are true that they satisfy you beyond a reasonable doubt of the guilt of the defendant as charged in the indictment, your duty would not be to convict him upon that state of case, for you

can not stop there, because other evidence has been offered. You find what evidence is true; you see whether or not the state of case established by the accusatory facts have been weakened or destroyed or left in a condition where when the whole evidence is considered that you may find to be true the case is not established beyond a reasonable doubt, and then your duty would be to acquit the accused. The converse of that proposition is also true. If you find from the whole of the evidence that it is
311 established beyond a reasonable doubt, your duty would be to convict him of whatever crime in yo'r judgment he is guilty of.

The character of the defendant has been offered in evidence before you. That is not a circumstance that is given to you which gives you the right to acquit upon it, nor is it given to you that you may have have a right to convict upon it if it was of bad character before this occurrence. You simply take it into account together with the other facts and circumstances, weighing it as a circumstance together with the other evidence.

I ask you to give this testimony that has been offered before you a critical examination; I ask you to see whether the testimony of each and ever' witness when viewed in its own light is reasonable, probable, and natural, or when viewed in the light of the other testimony you may find to be true, has the attributes of truth connected with it—that is, is it probable, is it reasonable, is it natural; does it portray the existence of a condition that in your judgment by the light of all the circumstances and facts that are true did exist, that it did occur in this way? You are to come to a conclusion in this way. And then you are to take the evidence of each witness in the light of the other facts you may find to be true. The testimony of a witness may seem to be very probable, very natural in its own light until you come to examine it in the light of the other witnesses. Examine the testimony of each witness in this way. You want to get at a conclusion that is just and a concluson based upon the truth in this case as you are able to find it. If you find beyond a reasonable doubt the truth of this charge I ask you to convict this defendant, because if he committed the crime of murder there by the taking of
312 this man's life when he was doing nothing that would give him the right to do so, or to say that it could be mitigated, there is nothing else but murder in it, and you should so find; it would be your duty to say so. You must of course be satisfied of that beyond a reasonable doubt—that is, as reasonable men would require their minds to be satisfied upon a proposition of like importance if it was presented to them as citizens, and as in the exercise of their duties as citizens they would give it that deliberation and that consideration that in their judgment would be necessary to enable their minds to come to a rational and just conclusion in the premises. If your minds are brought to a point where you have a conclusion that is fixed there with that degree of certainty that you would act upon it as a citizen, taking whatever action upon it duty called upon you to take, then you are convinced here, because no higher degree of certainty is required in the jury box than is required by the law of morals of a citizen when so situated. In other words, if from the whole of this evidence you find to be true there is driven out of the case all doubts for which good reasons can be given, there is not a real substantial doubt in the case, because it is only that kind of doubts we are to regard—we are not to consider every doubt which confronts us; they are always before

us on every proposition in life; they are always to be taken into account only when they are of that character when they would influence the mind of a reasonable man. If the case is carried to that point where you can say you have an abiding conviction to a moral certainty of the truth of the charge it is proven. On the other hand, if it is in that condi-
313 tion where there is a real substantial doubt of guilt, flowing naturally and reasonably to your minds from the whole testimony, you can with safety act upon that kind of a doubt; but it is only that kind of a doubt that you are authorized to regard in the case and acquit upon.

This case largely depends upon circumstantial evidence; you are to gather up all these circumstantial facts, see what they establish, see who they confirm and who they contradict, giving to the case that deliberation that its importance warrants, find out the truth of it, and base your verdict upon it, and you will have done your duty.

Gentlemen, you will retire to make up your verdict.

5:15 p. m.

Verdict: Guilty of murder.

The end.

314 At the time of the giving of which instructions the defendant took the following exceptions, claiming they were relevant to the charge of court as given.

First. Because the court erred in instructing the jury that they consider the evidence of Gentry's going out of the Indian country and leaving it in determining whether Gentry was a United States citizen or not, Whereas there was no testimony that deceased had ever left the Indian country.

Second. In saying to the jury that they could consider the fact that his relationship to Cherokee Indians was not made known at the time, or for a long time after his death there being evidence offered by defendant to show that in his life t[illegible] and up to the time of his death he claimed to be a Cherokee Indian and related to well-known Cherokee Indians whose names he gave.

Third. In summing up all the facts against the position of the defendant that deceased was a Cherokee Indian, and in failing to call attention to the facts which show he was a Cherokee Indian.

Fourth. In instructing the jury that "every wilful/ killing without just cause is done with malice aforethought."

Fifth. In instructing the jury as to the law of negligence and accidental or negligent killing and in saying to the jury in that connection that "that is only accidental in the law when every thing has been done which the law requires to be done to prevent injury or death."

Sixth. In saying to the jury that "if they do not find it a case of self-defense, or a case of manslaughter, they must find it a case of murder."

Seventh. In reference to the law of malice in homicide, and the use of a deadly weapon as establishing malice.

315 Eighth. In saying to the jury that the fact of preparing and carrying a deadly weapon and its use shows premeditation and deliberation.

Ninth. In instructing the jury that the peril which authorizes one to slay is the peril to life, and that the golden rule of right and wrong teaches us this; and in saying to the jury that "the party slaying acts as judge and a jury and executioner all at the same time, and therefore the right must be exercised with the greatest care and caution;" and in saying that the slayer must retreat as far as he can, and that the life of the defendant must be in deadly peril.

Tenth. And in instructing the jury that "the danger must be that which imperils life or the infliction of great bodily harm, and such bodily harm as endangers life or from which death may ensue."

11th. And in instructing the jury that "the invocation of false facts is a ground for presumption of guilt."

12th. And in saying to the jury "that if the defendant was on horseback and could have retreated it was his duty to do so, or if he could have protected himself by crippling his adversary it was his duty to do that;" and in instructing the jury that "if the danger could be turned aside in any other way it was the duty of the defendant to have done so, and it would be manslaughter in him to kill, though the deceased should have made an attack on him."

13. And in saying to the jury "if the defendant could have turned the danger aside with less violence than he used he would be guilty of manslaughter, even if a deadly attack was made on the defendant."

316 14th. And in saying to the jury "if there was any way of escape he must avail himself of that, even if deceased was engaged in a deadly attack on him."

15th. And in the comments on the law in reference to flight and the law as given by the court on that subject, and in reference to the law on the subject of threats.

And thereupon the jury retired to consider their verdict and afterwards returned into court the verdict of guilty of murder in the first degree.

Thereupon the defendant filed his motion for a new trial in the following words and figures:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF, *vs.* FAMOUS SMITH, DEFENDANT. } Murder.

The defendant Famous Smith, moves the court to set aside the verdict of the jury in this cause and grant him a new trial for the following reasons:

1. Because there is no evidence to support the verdict of the jury.
2. Because the verdict is not only unsupported by the testimony, but is absolutely against the testimony on the proposition alleged by the Government that the deceased, Gentry, was a white man and not an Indian.
3. Because the verdict is contrary to law.
4. Because the court admitted incompetent testimony to go to the jury against the objections of the defendant.

Because the court erred in instructing the jury;

1st. In saying to the jury that they consider the evidence of
317 Gentry's going out of the Indian country and leaving it in determining whether Gentry was a United States citizen or not. Whereas there was no testimony that deceased had ever left the Indian country.

2nd. In saying to the jury that they could consider the fact that his relationship to Cherokee Indians was not made known at the time, or for a long time after his death, it appearing from the testimony that in his lifetime and up to the time of his death he claimed to be a Cherokee Indian and related to well-known Cherokee Indians, whose names he gave.

3rd. In summing up all the facts against the position of the defendant that deceased was a Cherokee Indian, and in failing to call attention to the facts which show he was a Cherokee Indian.

4th. In instructing the jury that "every wil'ful/ killing without just cause is done with malice aforethought."

5th. In instructing the jury as to the law of negligence and accidental or negligent killing, and in saying to the jury in that connection that "that is only accidental in the law when everything has been done which the law requires to be done to prevent injury or death."

6th. In saying to the jury that "if they do not find it a case of self defense or a case of manslaughter, they must find it a case of murder.

7th. In reference to the law of malice in homicide, and the use of a deadly weapon as establishing malice.

8th. In saying to the jury that the fact of preparing and carrying a deadly weapon and its use shows premeditation and deliberation.

318 9th. In instructing the jury that the peril which authorizes one to slay is the peril of life, and that the golden rule of right and wrong teaches us this, and in saying to the jury that "the party slaying acts as judge and jury and executioner, all at the same time, and therefore the right must be exercised with the greatest care and caution," and in saying the slayer must retreat as far as he can and that the life of the defendant must be in deadly peril.

10th. And in instructing the jury that "the danger must be that which imperils life, or the infliction of great bodily harm, and such bodily harm as endangers life or from which death may ensue.

11th. And in instructing the jury that "the invocation of false facts is a ground for a presumption of guilt."

12th. And in saying to the jury "that if the defendant was on horseback and could have retreated it was his duty to do so, or if he could have protected himself by crippling his adversary it was his duty to do that." And in instructing the jury that "if the danger could be turned aside in any other way it was the duty of the defendant to have done so, and it would be manslaughter in him to kill though the deceased should have made an attack on him."

13th. And in saying to the jury "if the defendant could have turned the danger aside with less violence than he used he would be guilty of manslaughter, even if a deadly attack was made on the defendant."

14th. And in saying to the jury "if there was any way of escape he must avail himself of that, even if the deceased was engaged in a deadly attack on him."

15th. And in the comments on the law in reference to flight and the law as given by the court on that subject, and in reference to the law on the subject of threats.

319 Sixth. On account of the newly discovered testimony of Nancy Turnover, from which it is shown that immediately before the killing of deceased, Gentry, he made in her presence a threat to kill defendant and left her as if to execute the threat, all which appears from her affidavit herewith filed. This information comes to his knowledge since his trial.

(Signed) FAMOUS × SMITH.

Witness:
WM. M. CRAVENS.

Famous Smith, being sworn, says he believes the statement in the foregoing motion for a new trial as to newly discovered testimony are true.

Sworn to and subscribed before me this 10th day of July, 1893.

(Signed) STEPHEN WHEELER, *Clerk.*
By J. M. BAXTER, *D. C.*

And supported the same by the affidavit of Nancy Turnover in words and figures as follows:

WEBBERS FALLS, I. T., *July 7th*, 1893.

Personally appeared before me this day Nancy Turnover, who, upon her oath, says:

My name is Nancy Turnover. I live at Texane, in Canadian district, Cherokee Nation, or 2½ miles from the Texane post-office, with my brother-in-law, Bill Reynolds. At the time Jim Gentry was killed by Famous Smith, which was in August, 1883, I was living with George Vann as his wife; we lived together for about nine years; we separated about four years ago. At the time Gentry was killed we were liv-

320 ing about 2½ miles up the river from Webbers Falls. On the day Gentry was killed he came to our house; I don't know the time of day for we had no clock, but it was after dinner time. He came after a shirt that I had washed for him; he only staid a short time; he did not sit down; I thought he looked and acted like if he was mad about something; he got his shirt and went out to the yard fence, which is about 30 feet from the door, to get onto his horse. I heard them talking (George and Gentry); George had followed Gentry out in the yard; Gentry seemed to be talking in an excited or high tone and I sstepped to the door; Gentry was on his horse, and just before he rode off he said, "me or Famous one will have to die this evening." My husband replied to this, "O, no, Jim, I wouldn't do that; if I was you I would settle with him some other way." Gentry then loped off towards Famous Smith lived, saying as he left, "Take care of yourself." George said "I will; you take care of yourself." Gentry called back, "I will try to." In

about an hour after Gentry left we heard that he was killed. Famous Smith's house was in sight of where we lived, only a little ways off, perhaps 500 yards.

(Signed) NANCY × TURNOVER.

Witnesses:

M. C. SMITH.
MAUD S. SMITH.
J. W. VANN.

Sworn to and subscribed before me by mark of Nancy Turnover, on this the 7th day of July, after I had carefully read to the witness the contents of the foregoing affidavit, including interlineations. This having been done in the presence of the above subscribing witnesses, to all of which I certify. I further certify that I am a commissioned notary public for the first judicial division of the Indian Territory, and that my commission will expire on the 4th day of November, 1894. Witness my hand and seal as such notary at the date last above written.

(Signed) A. J. BODY,
Notary Public.

321 Which motion for a new trial the court overruled and sentenced the defendant to be executed, in accordance of the verdict and judgment of the court; and in overruling the court made the following remarks:

322 *Ruling of court on motion for new trial.*

UNITED STATES }
vs.
FAMOUS SMITH. }

The first cause set up in the motion for a new trial is that there is no evidence to support the verdict of the jury.

This of course can not be said to be correct; on the contrary, I think the evidence is sufficient to authorize the verdict.

The second cause the defendant sets out is that the verdict is not supported by testimony, but is absolutely against the testimony on the proposition alleged by the Government that the deceased, Gentry, was a white man and not an Indian. This cause and the first paragraph of the fifth cause, which is, "that the court erred in saying to the jury that *that* they consider the evidence of Gentry going out of the Indian country and leaving, in determining whether Gentry was a United States citizen or not; whereas there was no testimony that the deceased had ever left the Indian country," may be considered together. The court did not charge, as set out in the above paragraph, but the court said, not that they would consider the evidence of Gentry's going out of the Indian country, but that they would consider as to where he had been living. There was certainly evidence to support this, as Mr. Rice, on pages 52 and 53 of the evidence, says: "He said to me he was from some part of the State," meaning Arkansas, "the southern part I believe." On page 57 the same witness, in answer to the court, says: "He told me that he had lived in the southern part of Arkansas." This was a legitimate item of evidence to be taken

into consideration by the jury in passing upon this question. The
323 testimony, coming from all witnesses to whom you can attach any credibility, goes to show that the deceased, Gentry, was in the Indian country but for a comparatively short time. Mr. George Vann, on page 12 of the evidence, says: "Had not known Gentry long; it might have been a year or six months, or something like that. He came in there and I kind of got acquainted with him." Frank Vore only knew Gentry about a year. He (Frank Vore) was clerk of the election, and he says Gentry did not vote at election; don't know whether it was because he was not an Indian or had not been in country six months. He says, on page 37 of the evidence, that Gentry had been around there and over in the Choctaw country a year or longer. It is manifest from the evidence that can be depended upon that Gentry was in that country but a short time. It is true that one Fleetwood tells a story that indicates that he saw him in that country much sooner than he was seen by any other witness, but this statement is contradicted by all the circumstances in the case, and coming from a man who has but recently been tried for murder himself, as was Fleetwood, it must be regarded as a very suspicious statement. This fact pertaining to the jurisdiction is one to be determined, like all others that enter into a case, by the positive facts and circumstances offered in evidence. Like all other questions, the evidence on the point must be either positive or circumstantial. Both may concur, or one may establish a proposition without the other. One may destroy the other. It is claimed that deceased, Gentry, looked like an Indian. There are ten thousand persons in this country who look like Indians who have not a drop of Indian blood in their veins, so that circumstance is a very weak
324 one. It is said that Gentry claimed to be an Indian. When we look at this fact in the light of the actual condition of things as to proving power it becomes one of the most trivial character. There is in the Indian country at least 15,000 men claiming that they are Indians when they haven't even the shade of a shadow of truth to found this claim upon. Almost every man who gets into that country and who desires to get a share of the bounty belonging to the Indians begins to assert a claim founded upon the possession of Indian blood, when everybody knows that such claim is totally unfounded.

There are a few circumstances in this case bearing upon this question which far outweigh all positive facts offered by interested or sympathising witnesses. If this man Gentry was an Indian, Smith would have found it out during the long, dreary ten years that he has been scouting, not from the office's of the Indian courts, but as he says in his own testimony, from the officers of this court. If Gentry was an Indian, and he was an Indian, as he is, why would he scout from the officers of this court? He is an intelligent man; he has had ample time to advise with counsel before his arrest, and to learn that he could not be tried by this court; then why scout from its officers, if it had no jurisdiction? He had nothing to fear with his influence in the courts of his own country; he would not have run from them. It must be remembered that he was interested during all of this time in knowing what tribunal had jurisdiction of the case. His conduct in scouting, or becoming a refugee from justice, clearly shows that he knew the facts, and in the light of his actions the fact must have been that Gentry was not an Indian. It is manifest to my mind from

the whole of this testimony that Gentry came into that Indian
325 country at the time spoken of by George Vann, by Vore, and others, and it is a reasonable conclusion that he had been raised, or at least lived for a long time out of that country, and if this were so, and he had Indian blood, he would have to be readmitted to Indian citizenship under the constitution and laws of the Cherokee Nation before he could become a citizen of that nation. It is claimed that Gentry was connected by blood with very prominent families in that Cherokee country. Members of these families live in the vicinity of where he was killed; yet, Gentry was buried as a stranger in a strange land, not one of these relatives, who must have known of his murder, every looking to his burial. We know that if he had been related to them that Indian blood is too thick to permit an omission of this character; they do not neglect their dead relatives in this way.

Again, not one member of any family, to whom they claim that Gentry was related, has ever taken any interest whatever in the trial of the man who killed him, nor has one of them been brought here by the defendant to prove this relationship. It is a rule of evidence that the best evidence should be produced. To strengthen a conclusion, for the same reason, the best witnesses should be produced. This fact, to my mind, is a very powerful circumstance going to show that the assertion that Gentry was connected by blood with prominent Indian families is a mere afterthought. Mr. Vann says, on page 16 of his evidence, "I do not believe he was recognized as an Indian." I think the facts which go to show that Gentry was a jurisdictional citizen of the United States are sufficiently strong to prove the proposition beyond a reasonable doubt, and I do not believe there was any error committed by the court in the charge upon that proposition.

326 The third cause in the motion for a new trial is because the verdict is contrary to law. I do not think there is anything in this position.

The fourth cause is, because the court admitted incompetent testimony to go to the jury against the objections of the defendant.

The fifth cause embraces errors alleged to have been committed by the court in charging the jury, and the first error has already been noticed in connection with the second ground for a new trial. The second error has also been spoken of by the court. The third error relates to the action of the court in failing to call attention to the fact which showed that he was a Cherokee Indian, and in summing up all the facts against the position of the defendant, that deceased was a Cherokee Indian. I do not think there was any error committed in this part of the charge.

The fourth objection to the charge is, that the court stated that every willful killing, without just cause, is done with malice aforethought. This is an erroneous statement of what the court did charge on that proposition. It is only necessary to go the top of page 10 of the charge to show that the court did not charge in the way alleged by the defendant. What the court said upon that proposition was this:

"I may remark in this connection that if this killing was done willfully, and there was not in it anything which justified it under the law, or which reduced the grade of the killing from the higher crime to one of less grade, known as manslaughter, from the fact that it was done willfully you will

find that it was done with malice aforethought, because every willful killing done without just cause or in the absence of mitigating facts
327 is a killing with malice aforethought, for as you will ascertain presently one of the most comprehensive definitions of that phrase is the doing of a wrongful act without just cause or excuse, which produces death in such a way as to show that it was done in the absence of justifying cause, or in the absence of mitigating facts."

This is manifestly a different proposition from the one asserted in the motion for a new trial, and it is as just as manifest that it is a correct statement of the law.

The fifth error complained of in the charge is that the court erred in instructing the jury as to the law of negligence and accidental or negligent killing, and in saying to the jury in that connection that that is only accidental in the law when everything has been done which the law requires to be done to produce injury or death. It may be well to here state what the court did say upon this proposition; it was treating of the meaning of the word willful. It said:

"The word 'willful' as used in connection with a charge of murder, such as is preferred in this indictment against this defendant, means an intentional killing and not an accidental killing. It means an act which results in death, which is intentionally done and one that is not accidentally done. I want to remark to you in this connection that there are but two conditions growing out of human conduct, *and* of them is a condition which goes to show that what transpires was what the law calls an accident and the other is a condition to which the law attaches willful/ness or intent. Now, I define to you what is meant by accident that you may the better under-
328 stand what is meant by a willful act, because it is not only the act which has behind it a specific intent, a specific purpose, that is willful, but wiilful/ness is attached by the law to that which is not an accident. It may grow out of negligence; it may spring out of negligent conduct. There is a great difference, as the law recognizes, between that which is an accident and that which is intentional. The law fastens intent to everything that is not an accident. Every act that produces death which is outside of the definition of the word accident is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that kind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act which, from its nature and the way it is executed as a natural and probable and reasonable result death may ensue from the execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence."

The sixth error in the charge as complained of is, that the court said to the jury that if they do not find it a case of self-defense, or a case of manslaughter, they must find it a case of murder.

There can be no error here, in view of the fact that there are but three conditions growing out of the taking of human life, outside of an accidental killing, and there was no claim in this case that it was a killing of that kind. These three conditions are murder, man-
329 slaughter, and self-defense. If the case does not belong to one class it must belong to one of the other remaining classes. If you

exclude it from two classes it necessarily falls in the third. This is a method of reasoning by elimination, which is authorized by both logic and law, and is frequently the most certain method of reasoning that cann be adopted to enable us to get at a correct conclusion.

The seventh paragraph is, that the court erred in its charge in reference to the law of malice in homicide, and the use of a deadly weapon as establishing malice.

As there are no specifications showing in what particular the charge upon the subject from the use of a deadly weapon as showing malice aforethought was wrong, it is difficult for us to understand what the complain' amounts to. The court in the charge did say that the use of a deadly weapon intentionally, without just cause or legal provocation or mitigating circumstances, is evidence of the existence of malice aforethought. The charge does assert this principle, as it is unquestionably correct, and so recognized by all courts of any respectability and all legal authors of any standing.

The eighth cause of complaint is, that the court erred in saying to the jury that the fact of preparing and carrying a deadly weapon, and its use, shows premeditation and deliberation.

The court did not say that the preparing and carrying of a deadly weapon shows premeditation, but it said, as shown on pages 27 and 28 of the charge, that "The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand; and whenever a party entering upon what-
330 ever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful way, the fact of so preparing the weapon and selecting it for use in that unlawful and wicked way, in a way not authorized by the law, in a way that the law would not mitigate the act as done, I say, the fact of the selection and preparation of a deadly weapon, and the use of it in a deadly way, after he had so selected it and prepared it, shows the existence of a state of premeditation, shows that he thought of the purpose to killing wrongfully and unlawfully before he executed it, and when that state of case exists, there is a condition of malice aforethought which goes to characterize the act as done. It shows the purpose to do a wrongful act without just cause or excuse."

The ninth cause is, th't the court erred in instructing the jury that the peril which authorizes one to slay is the peril to life, that the golden rule of right and wrong teaches us this, and in saying to the jury that the party slaying acts as judge, jury, and executioner all at the same time, and therefore the right must be exercised with the greatest care and caution. And in saying that the slayer must retreat as far as he can, and that the life of the defendant must be in deadly peril."

This language is not a correct statement of the part of the charge of the court bearing upon this subject. It becomes necessary to read what the court did say upon the proposition alluded to by this alleged error. The court in speaking of the law of self-defense said that "we should go to the law, and find out what this definition of the law of self-defense is; find out when it says that we may slay our fellow-man; and it is by the
331 definition of the right as given by the law that we are to be governed. This is the right that exists that is sometimes called

the law of necessity, a right that must exist from necessity. It is the necessity of the case that produces the right, as it may be in the hands of a particular individual. If the necessity is absent we can not stretch it, as a rubber blanket, to cover a case, and say we stood upon the law of self-defense. We can only stand upon it when the facts surrounding us give us the right to stand upon it.

"We can not place ourselves there. It is the law of the land which gives us the right to stand there. We can not place ourselves there because of a bear state of fear that may control us, which may be upon our minds, and which may be operating upon us at the time. But there must be that condition which is expressly pointed out by the law as a condition that will give us the right to slay our fellows, or to act in the position of judge, jury, and executioner, all at the same time; to determine what the law is, find what the facts are at the time, make an application of that law to these facts, ascertain the result in the shape of a verdict, enter up a judgment upon that verdict, then act as a marshal or sheriff and execute the man, all at the same time. That is a great right; that is a greave responsibility; that is a concentration of mighty powers in the hands of any individual. Mighty as it may be, great as it may be, and responsible as it may be, it is still a right that exists in the hands of a citizen, to be given him when he is entitled to it, and in no other case." There are two propositions contained in the ninth and tenth paragraphs setting up error in the charge, which it becomes necessary to notice with some particularity. The
332 first is in saying that the slayer must retreat as far as he can, and that the life of the defendant must be in deadly peril; and that the danger that he can kill to tu'n aside must be that which imperils life, or, in the language of the motion for a new trial, "the infliction of great bodily harm, and such bodily harm that endangers life or from which death may ensue." We must first see what the court did say upon these points. In the charge the court said:

"Now, what is the very first proposition we start with under this law? That the party who invoked it must have been doing at the time of the killing that which he had a right to do, or at the time that he was attacked by the party slain he was doing that which he had a right to do. If he was, and was attacked by another under circumstances which denoted an intention to take away his life or do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Gentry must have made such an attack upon him as indicated from the way it was made, or from the character of that attack, that he intended then a'd there to take away the life of the defendant, or to inflict upon him some enormous bodily harm. And what is meant by that? Not a mere break of the skin, but some harm that might produce death, and that harm was inflicted upon the body. If Gentry was doing an act of that kind, or was about to do it, to do it so soon as that there could not be any escape from the result that he was then contemplating, the defendant may then lawfully kill Gentry * * *; provided he
used all the means in his power otherwise to save his own life or
333 prevent the intended harm, such a' retreating as far as he can or disabling his adversary without killing him, if it be in his power.

* * * Now, if he could not escape from that danger by getting out of the way of it, or if he could not escape from it by the use of less violence than he did use, he may use deadly violence. But if he could have avoided it, it is his duty to avoid it. But if he could have avoided that by the exercise of reasonable care, or if he could not have avoided that by the exercise of less violence than he did use, he would have a right to take his life."

This a statement of these two propositions as they are contained in the charge. In saying that the slayer must avoid the necessity of killing if possible, either by getting out of the way of the danger, or by turning it aside by some act other than one of a deadly character, I conceive that the court is sustained by the trend of all respectable authorities. The very phil'sophy of the law of self-defense, as well as all well-considered cases, support the rule. The rule as given by the court is so strongly in favor of the protection of human life against the reckless and unnecessary destruction of it, that it would seem the courts being organized to protect life under such circumstances ought to adhere to this rule.

We must remember the charge is given in view of the evidence in the case. If the state of case as asserted by the defendant could be believed, then it was a case of a party advancing on him with a knife, he being mounted, and armed with a deadly weapon, to wit, a revolving pistol; and the deceased knew this. Taking the case as made by the Government and the act
334 of the deceased having advanced upon the defendant with a drawn knife ceases to be probable or even possible, but the charge was given upon the theory that the statement of the defendant was true. If it was true he was so situated that he could have easily kept the deceased at bay without killing him, or he could have gotten out of the way of danger. It must be remembered in considering the charge of the court it is to be taken together, not a sentence detached from other sentences. Taking it together it asserts a proposition in the interest of human life, for it secures its preservation in cases where there is no necessity for its destruction. It, in effect, declares, when the attempt is one against the person, an assault upon the person, so that it becomes a simple question of personal defense, the defendant must have avoided the killing by getting out of the way of danger, if he could have reasonable have done so with due regard to his own safety. There is some apparent conflict in the cases decided, but this arises because of the difference in these cases. The rule only contemplates that the party shall avoid the danger before killing when he can reasonable do so with regard to his own safety. There is a line of cases which have been decided when the facts showed it was not possible for the party to have avoided the danger, having reasonable regard for his own safety; and, in such cases, the courts have held that the danger in the light of the facts could not be avoided; therefore, the party was not called upon to avoid it, but that he might stand without avoiding the danger and even take life. But this does not interfere with the general principle that whenever it is possible to do so, having in view his safety, a party must
335 avoid resorting to the dernier remedy of taking life whenever he can do so with due regard to his own safety. Sometimes a party can not escape the danger by retreat or by avoiding the condition that confronts, and then he is not required to do so; he is not bound to retreat if

his danger is increased or it is not even lessened by such retreat. The charge of the court in this case does not interfere with this rule of law as applicable to such facts as I have named, for the court charged:

"If the defendant could not escape from that danger (meaning deadly danger by Gentry) by getting out of the way of it, or he could not escape from it by the use of less violence than he did use, he may use deadly violence; but if he could have avoided it it was his duty to avoid it. But if he could not have avoided it by the exercise of reasonable care, or he could not have avoided it by the use of less violence than he did use, he would have a right to take his life."

In the light of the decided cases, if defendant could have put the danger behind him by avoiding it, it most certainly was his duty to do so. In other words, retreat is a duty, and necessary when practicable. Wharton, on Homicide, sec. 485, says:

"In cases of personal conflict it must appear, in order to establish excusable homicide in self-defense, that the party killing had retreated, either as far as he could, by reason of some wall, ditch or other impediment, or as far as the *fe*irceness of the assault would permit him."

Mr. Bishop, in his new Criminal Law, sec. 869, par. 3, says:

"One forseeing an attack has no right of self-defense until he has done everything to avoid the necessity of employing it.
336 But after a man has retreated, and while no further way of escape is open, he may turn and kill the aggressor, not having brought upon himself the necessity which he pleads."

In regard to the extent of the danger which the party may defend against by killing, in his new work on Criminal Law, sec. 865, Mr. Bishop says:

"The rule is commonly stated in the American cases thus: If one who is assaulted (we have seen that there must have been an overt act rendering the danger imminent) being himself without fault in bringing on the difficulty, reasonably apprehends death, or great bodily harm to himself, unless he kills the assailant, the killing is justifiable."

In the case of the Commonwealth versus Selfridge, Horrigan & Thompson's Cases of Self-Defense, the court charged the jury thus:

"A man, who, in the lawful pursuit of his business, is attacked by another under circumstance which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far a- he can, or disabling his adversary without killing him if it be in his power."

I do not consider that this charge, or the principle as declared therein, has been affected in the least, by all the criticisms of text writers and others upon it. The authors of Horrigan & Thompson, in a note to the case of Selfridge, on page 30, say:

"But where the attempted felony consist in an assault upon my
337 person, so that it becomes a simple question of personal defense, not only the law as laid down by Justice Parker in the principal case, but also laid down in the text-books, and most of the adjudicated cases, requires me to retreat if I can, before killing the assailant."

In the case of State v. Benham, 23 Iowa, 154, Judge Dillon, who was then on the supreme bench of the State, said:

"And the jury should have been directed to ascertain whether all the circumstances in evidence denoted or showed an intention on the part of Shepard to take the life of Benham, or to do him some enormous, some dreadful bodily harm. If they did, then Benham in self-defense might lawfully take the life of his assailant, provided he used all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating if the assault was not so sudden, *feirce*, and dangerous as to render retreat unsafe, or if retreat were not practicable, then by disabling his adversary instead of killing him, if it were within his power simply to disable him."

This recognizes also the principle that to give him the right to kill the intention of the party he killed must have been to do him some enormous or some great bodily harm, some dreadful bodily harm. The latter principle is fully recognized in the case of the State v. Burke, 30 Iowa, 331. The court said:

The law gives a person the same right to use such force as may be reasonably necessary under the circumstances by which he is surrounded to protect himself from great bodily harm as it does to prevent his life being taken. He may excusably use this necessary force to save himself from any felonious assault."

338 The same view is supported in the following cases: The State v. Thompson, 9 Iowa, 188; The State v. Decklotts, 19 Iowa, 447; The State v. Neely, 20 Iowa, 108; The State v. Kennedy, 20 Iowa, 569.

The most recent case where the principle requiring a party to avoid the necessity of killing when he can do so with regard to his own safety, and that he can only kill to prevent death to him or great bodily harm, is the case of United States vs. King, tried before circuit court of the United States in the southern district of New York in 1888. In his charge to the jury, Circuit Judge Lacombe said:

"If an assailant comes against me with a deadly weapon, apparently intending to use it, or, if without this weapon he assails me, breathing forth threatenings and slaughter, or by any other means indication that it is his intention to inflict upon me a beating of such a character as to imperil life, or to maim me, or do me gr'evious bodily harm, then I may take life when necessary to repel the assault. That is the general rule. But, like all rules, it must be studied with its qualifications, and the first qualification to which I desire to call your attention is this: It is my duty when attacked to retreat as far as the *feir*ceness of the attack will permit. It used to be said that it was the duty of the assailed to retreat to the ditch or to the wall. That picturesque expression was coined before the days of fircarms, when every man who walked the streets of London walked with his weapons by his side, his rapier or his dagger, his quarter-staff or single-stick. It is not adapted for our use now, and even when it was coined it was ill-adapted to its purpose, for a man

339 might be assailed at a place where there was neither ditch or wall within three miles. The rule laid down by later authorities and sanctioned by text-writers of ability is this: It is the duty of the assailed to abstain from the infliction of death until he has retreated as far as he can with safety to himself."

The above case is reported in 34 Fed. Rep., 302.

In the case of Brown v. State, 83 Ala., 33, the court declares:

"The slayer must retire from the combat if there be a mode of escape which will not endanger his safety."

In the case of State v. Donnelly, 69 Iowa 705, the supreme court said:

"Where a person is assailed by another who attempts to take his life, or inflict great bodily injury, and the assailed can manifestly secure safety by retreating, then it is not necessary to take the life of the assailant to prevent the consummation of the felony intended."

In Roscoes's Criminal Evidence, 768, note, the annotater says:

"When a man expects to be attacked, the right to defend himself does not arise until he has done everything to avoid that necessity."

And to support this principle he cites People v. Sullivan, 7 N. Y., 396; Mitchell v. State, 22 Ga., 211; Lyon v. State, 22 Ga., 399; Cotton v. State, 31 Miss., 504; People v. Hurley, 8 Cal., 290; State v. Thompson, 9 Iowa, 108; U. S. v. Mingo, 2 Curt., 1.

In the case of State v. Donnelly, the defendant shot the deceased while he was pursuing him with a pitchfork, and in a state of great
340 anger. In the face of these facts the court declared the rule as above stated.

In State v. Shippy, 10 Minn., 223, the supreme court said:

"The right to defend himself would not arise until defendant had at least attempted to avoid the necessity of such defense."

Sec. 1010, Wharton on Crim. Law, declares:

"There may be cases sometimes occurring, though very rare and of dangerous application, where a man in a case of personal conflict may kill his assailant without retreating to the wall."

The above principles are fully recognized and declared in Blackburne v. State, 86 Ala., 595; Poe v. State, 87 Ala., 65; Cribbs v. State, 86 Ala., 613; Fallin v. State, 86 Ala., 13.

In fact the cases I have referred to but reflect the trend of the authorities generally, and I think they clearly sustain the charge of the court on the point complained of, and they dispose of both the 9th and 10th causes for a new trial.

The 11th cause is, the court erred in instructing the jury that the invocation of false facts is a ground for the presumption of guilt.

The court in its charge said:

"If that was not the state of case (meaning it was not one to which the law of self-defense could be applied), or the state of case did not exist as denominated under this other proposition, that state of case is undertaken to be sustained by testimony, by the statement of pretended facts, it would necessarily follow that it would be the invocation of false facts, and such an invocation as that kind of testimony, instead of doing the party who calls upon it any good, is a foundation for a presumption
341 against him, because the law says that he who has the truth upon his side, he who has innocence upon his side, does not fly to falsehood, does not create a state of case where he relies upon a state of fictitious facts."

This is but a declaration of the law as to the effect upon the cause of willfully using forged testimony. Its correctness is fully sustained by Sec. 742 of Wharton's Crim. Ev., in which it is said:

"The numerous fabrications of evidence in behalf of the claimant in the Tichborne case also had much influence in leading to the conclusion of guilt."

The 12 paragraph in the motion for a new trial is that the court erred in saying to the jury that if the defendant was on horseback and could have retreated it was his duty to do so, or if he could have protected himself by quitting his adversary it was his duty to do that. And in instructing the jury that the danger could be turned aside in any other way it was the duty of the defendant to have done so, and it would have been m'nslaughter in him to kill although the deceased should have made an a'tack upon him.

The 13th paragraph says the court erred in saying to the jury "If the defendant could have turned the danger aside with less violence than he used he would be guilty of manslaughter even if a deadly attack was made on the defendant."

Although these two paragraphs do not state the charge upon the subject referred to by them with entire correctness, yet it is sufficient to say that the principles alluded to by them has been already discussed by the court.

342 The 14th paragraph is, "That the court erred in saying to the jury of there was any way of escape he must avail himself of that, even if deceased was engaged in a deadly attack upon him."

It is only necessary to read the charge to ascertain that this cause for a new trial does not state correctly what was charged, and this is a sufficient answer to it.

The fifteenth cause is that the court erred in its comments on the law in reference to flight, and the law as given by the court on that subject, and in reference to the law on the subject of threats.

I suppose the first part of this paragraph has reference to the fact that the defendant was a fugitive from justice. I thin' the definition of who is a fugitive from justice was correctly defined in the charge, and in face of the fact that defendant was such a fugitive for ten years, I think it was highly appropriate that the jury should have had their attention called to the fact that this was a circumstance they might consider against him.

The sixteenth paragraph is on account of newly discovered testimony of Nancy Turnover, from which it is shown that immediately before the killing of Dick Gentry he made in her presence a threat to kill defendant, and left her as if to execute the threat, all which appears from the affidavit hereinafter filed. This information has come to his knowledge since his trial.

It is sufficient to say that the rule of the law is that before a court c'n grant a new trial because of newly discovered evidence it must be shown that due dil/igence was used to obtain this testimony before the trial. If this were not the law great wrong might be perpetrated, and the

343 due and proper administration of justice might be greatly interfered with. There must be a strict application of the rule, and it may be remarked that in this case no due dil/igence has been shown to have enabled the defendant to have learned of and obtained this evidence before trial.

The motion for a new trial will be overruled.

344 To which the defendant at the time excepted, and time having been given him by the court for that purpose he now tenders this his bill of exceptions and prays that the same may be signed and made a part of the record in this cause, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding the Circuit Court.

(Endorsed on back:) Filed Aug. 23, 1893. S. Wheeler, clerk. By I. M. Dodge, D. C.

345 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
FAMOUS SMITH, DEFENDANT. } Murder.

Now, on this day comes the defendant, Famous Smith, by Thos. H. Barnes and Wm. M. Cravens, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this to wit:

1. Because the court erred in instructing the jury in the following words:

"It is charged in this indictment, and it is necessary to be charged to give the court jurisdiction, that James Gentry was a white man and not an Indian. The meaning of that is, that he was a citizen of the United States; or, more correctly speaking, a jurisdictional citizen of the United States. Under the laws of this country every man in it, outside of a few persons who are exesmpted by the law, whether he is a full political citizen of the United States, or no matter what his relation in that regard may be, is a jurisdictional citizen. For example, we have a class of people who can not become citizens of the United States because of a prohibition by law. I refer to the Chinese; yet, if a Chinaman kills in the land, he is a citizen so far as a subject to the law is concerned; and if anybody else kills him, in the eye of the law he is citizen. Prac-

346 tically he is not a citizen, because mobs kill him, and we do not do anything with them, but laugh at them; but in the eye of the law he is a jurisdictional citizen. So it is with reference to everybody, except the people who are called Indians, and who are living upon their reservations, the place set apart to them as such; and when an offence is committed there in that country by one Indian upon another, the courts of that country alone have jurisdiction. This is now the rule with reference to the five civilized tribes, and the other Indians who are in that country only because the jurisdiction of the courts of the United States have been extended over what are known as the wilder tribes, or the wilder Indians. Different courts of the United States have jurisdiction over them. Now, then, that is the meaning of this allegation that James Gentry was a white man and not an Indian—that is, that he was a citizen of the United States. If he was, notwithstanding this defendant is an Indian, the court still has jurisdiction. In this reservation of jurisdiction to the Indian courts they were not permitted to entertain

jurisdiction of cases where upon the one hand a citizen of the United States was affected by the act of an Indian, or the Indian was affected by an act of a citizen of the United States. Now, you are to pass upon that fact just like you are to pass upon any other fact. In the first place, it is recognized by the Executive Department of the Government of the United States now that these tribes or nations of Indians, the Cherokees and others, have a local government of their own; they have what is called an autonomy of their own. And that being their situation that the question as to who is a citizen of that country is a question that they have a right to settle finally, and it is a question that they are to adjudicate and
347 pass upon finally as far as it may affect the legal rights of that nation or its members. Consequently it becomes a material fact in the investigation of a case of this character, when one of the issues involved is as to whether the party is a citizen of that country or not, to ascertain whether he has been recognized legally by the authorities of that country as a citizen thereof. If he had not, that is prima facie evidence for a conclusion that he was not a citizen of that country, because until that is done we have a right to take it for granted that he stands outside the pale of that nation. He might still say that he was a citizen, although they had not recognized him, but their failure to recognize him as a citizen is competent fact to be taken into consideration by you in passing upon that question. Then you are to consider another fact. You are to consider as to where he had been living.

Now, this court charges the jury that if a man is an Indian by blood, and if he goes out and lives among the white people, abandons his country, lives among white people who are citizens of the United States, and performs the duty belonging to citizenship, or exercises the rights that pertain thereto, that that is evidence upon his part of a purpose to abandon the relation that he may have to that country and to its people, and he may abandon it in that way so as to cause him to become a jurisdictional citizen of the United States. If he is simply out temporarily, and is not subject to the duties of citizenship—that is, duties of citizenship that are placed upon the citizen of a State or of a nation, and he does not exercise any of the rights belonging thereto—he then may retain his Indian status, he may still be an Indian; but the fact that he is still living out of that country, lives away from that people, and lives among the people of the United States, is a fact that you may take into account as a fact going to show that he was a citizen of the United States. This jurisdiction
348 conferred by the law upon the courts of the United States to try for the commission of crimes in the Indian country contains, as I have already told you, an exception which is that if a crime is committed by one Indian upon another—that is a proviso to the section—if the Government shows a state of case where there has been no recognition, if the Government shows a state of case where a man, as far as the evidence shows, has constantly lived out of that country, and came into it at a late period, you have a right to take these facts into consideration as establishing a state of case that would prove the proposition sufficiently until it is overthrown by evidence establishing a state of case that is different from the allegation contained in the indictment.

You have a right, and it is your duty, to take into consideration upon this proposition all the facts and circumstances; the fact that if he was

related there that his relatives took no interest in him when killed; the fact that if he was connected by the ties of blood with that peo'le that that was manifested or made known at the time of the killing, or since that time, and all these usual probable and natural circumstances that would exist if the proposition is true that he was an Indian, and that would surround him as a member of that nation. You, in other words, are to pass upon the question as to whether or not the fact that he was an Indian is a true fact that exists, or whether it is a mere afterthought in this case; and in pa-sing upon that, as in passing upon other propositions in the case touching the guilt or innocence of this defendant, you have a right to take into consideration his own conduct in the premises, his own actions in the premises. There is no evidence here going to show that he was fleeing from justice, as far as it may be asserted by the courts in
349 the Indian Territory in this case; there is not a syllable of testimony that points in that direction. And if he become a fugitive from justice because of any desire to not appear in this tribunal it becomes material to take into account and contemplate the matter as to whether it would be natural or reasonable that he would become a fugitive from justice for ten years from a trial in this tribunal if the tribunal, and he knew it, had no jurisdiction of the case. I say, as I said to you in the beginning, that upon all these propositions that may be asserted or contradicted you are to pass upon these as reasonable men; you are to pass upon their reasonableness and their probability and their naturalness. If they are not reasonable in your judgment as men of sense, men of experience, men of observation in life, if the assertion of a proposition is not a reasonable assertion, if it does not seem to be consistent with what would be the action of a man situated as was the defendant at the time, you have a right to take that into consideration in passing upon the truth or falsity of the proposition. You have a right to do it upon this one just as you have upon all the propositions in this case. It is your duty to find this proposition of jurisdiction as you are to find the other propositions, beyond a reasonable doubt. If from these facts and these circumstances you find it beyond a reasonable doubt then you may proceed to investigate the merits of this case. If you can not find it to that extent the case must fall to the ground, because then no matter what might be the state of case as to whether the defendant is guilty or innocent of a crime it would not be within your province or mine to investigate it upon the merits, and you would not be authorized to find a verdict upon the merits. But if that proposition is sufficiently established in your minds, then you pro-
350 ceed to investigate whether a crime was committed here or not."

2. In this; the court instructed the jury on the subject of mental condition in the following words, as found from page 8 to 9:

"We have now gotten along to where it becomes necessary to find what condition of mind the defendant was in when he did this act of shooting; in other words, we are called upon to find whether he did it willfully and with malice aforethought. If he did the act of shooting willfully and with malice aforethought, because of the intimate connection between an act of that kind and the result called death, the law says that he produced the death willfully and with malice aforethought. Therefore, in ascertaining this condition or these conditions of mind which go to characterize an act it is only necessary to find what was the condition of the mind

of the man when he did the deadly act, when he performed the deadly act, when he fired the deadly missile into the body of Gentry. If that act of firing was done willfully and with malice aforethought, then he killed Gentry, having the same condition of mind, because the law holds this man, as it holds all other men, to have intended the necessary, natural, or probable consequences of his acts. And when he does an act that is wilfull and characterized by malice aforethought, the consequence has the same characteristic, has the same attributes connected with it, as the act has. Now, we must go to the law to find the meaning of these expressions, because the law defines them. To secure greater certainty, and therefore to secure better enforcement of its provisions, that life may be secure and safe, by all men being promptly punished when their crime is correctly and fully ascertained, it defines what the crime is,
351 it tells us what enters into it, what goes to make it up, and by that definition of it we are governed."

3. In this the court instructed the jury as follows, found on page 10 to 11:

"Now, of course, we are governed by the definitions of these expressions as the law gives them to us, and I may remark in this connection that if this killing was done wilfully, and there was not in it anything which justified it under the law, or which reduced the grade of the killing from the higher crime to one of less grade known as manslaughter, from the fact that it was done wilfully, you will find that it was done with malice aforethought, because every wilfully killing done without just cause or in the absence of mitigating facts is a killing with malice aforethought, for, as you will ascertain presently, one of the most comprehensive definitions of that phrase is the doing of a wrongful act without just cause or excuse which produces death in such a way as to show that it was done in the absence of justifying cause, or in the absence of mitigating facts. A man shoot another down; there is nothing to justify the killing. There is nothing to reduce the grade of it. From the very fact of his shooting the man down you have a state of case that would authorize you to say it was done wilfully and with malice aforethought, and you would find it was done with malice aforethought when you find it was done wilfully; and you would find it was done wilfully, in the only way you could find it, by the character of the fact as done, by the way the party did it, such as drawing, presenting, and firing a deadly weapon. That is all that
352 a reasonable mind would want to show that it was a case of murder. That is all that your minds need and require by the law when you are in the jury box and administering the law as citizens of the country, and in the capacity of jurymen.

4. In this, the court instructed the jury upon the subject of wilful, as follows (page 11 to 17):

"Now, let us see what is the meaning of the word 'wilful.'

"The word 'wilful,' as used in connection with a charge of murder, such as is preferred in this indictment against this defendant, means an intentional killing and not an accidental killing. It means an act which results in death, which is intentionally done and one that is not accidentally done.

"I want to remark to you in this connection that here are but two conditions growing out of human conduct, and one of them is a condition

which goes to show that what transpires was what the [illegible] dent, and the other is a condition to which the law attaches [illegible] intent. Now, I define to you what is meant by an accident t[illegible] the better understand what is meant by a wilful act, because [illegible] only the act which has behind it a specific intent, a specific purpo[illegible] is wilful; but wilfulness is attached by the law to that which is no[illegible] accident. It may grow out of negligence; it may spring out of negli[illegible] gent conduct. It is not claimed on either side in this case, nor could it be truthfully, that there was anything like negligence in the case, but that you may the better understand and comprehend the meaning of the word wilful as the law fixes that meaning, I give you the definition of the word 'accident.'

353 "There is a great difference, as the law recognizes, between that which is an accident and that which is intentional. The law fastens intent to everything that is not an accident. Every act that produces death which is outside of the definition of the word "accident" is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which, from its nature and the way it is executed, as a natural and probable and reasonable result, death may ensue from the execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence.

"Now, you might take a man who is handling a dangerous or deadly weapon, such as a gun or pistol, and if he would exercise the care that the law exacts of him to prevent any injury to another, and yet an injury transpired, he would not be responsible for anything, because there is nothing to which you can attach wilfulness and in a case of that kind, because of the character of the weapon used or handled the law exacts of him the very highest possible care that he can exercise. The care exacted by the law is always proportionate to the danger to others, and when a man goes outside of that, and does not exercise that care, he becomes guilty of an act that is wilful, in the law. When a man exercises that amount of legal care, and something occurs beyond that, that is not his wilful act. The law recognizes that he does not do it wilfully; but

354 when he does an act which naturally, or reasonably, or probably, from its nature, and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional, and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional.

For example, if a man draws a pistol upon another, presents it and fires it at him, you ascertain, if you are called upon to investigate a case of that kind, whether or not he did that firing intentionally. How could you tell that? He has not told you beforehand that he intended to fire. He has not said a word, in the case I have put to you. How do you know that the act was intentional? Why you go to the actions of the man, as a matter of course, just as you do in the everyday affairs of life.

There is no ... required, no great amount of effort or ... jurymen; it is simply the performance of what they do every day of ... lives if the same state of case is presented to them. You, for example, see a man present a pistol at another, he fires it, he pulls the trigger. You know that a pistol is a deadly thing; you know it is made for the purpose of taking life, and you know it is inanimate; you know it has no vitality of itself; you know it is a mere machine; it must be acted upon. And the very fact that it must be acted upon to produce a deadly result is a fact that enables us to tell whether the party who used it is using it intentionally. The fact of the drawing, presentation, and firing of it shows the intentional use of it, because these are facts that men in the everyday affairs of life consider as sufficient to prove that fact, to produce that conclusion. When
355 you see a man in that attitude towards another and you see him fire you conclude from that circumstance, or from this occurrence of circumstances in the shape of drawing, presenting and firing the pistol that he is doing a wilful act. That is the way you arrive at it. That is the reasonable way to arrive at it, and you conclude from that condition that it is not an accident that is transpiring, but it is something that is intentional; that he who does it intentionally does an intentional act, and you are authorized to go further than that. Because of the character of that weapon and the known results, results known to he who thus uses it, that which follows such use of it, the law gives you authority, and the law of logic as well as the law of the land says it is your duty to find from a state of case of that character not only that he intended to do that act wilfully, but he intended whatever result follows from that act. If death follows from it it follows as a matter of course, as a natural and reasonable consequence that usually or probably or naturally may occur from an act of that kind, and therefore from facts of that character you have a right to infer that he willed the death that he produced; that the deadly result is a wilful result upon his part a' far as he was concerned. You now see the method of finding a proposition of that kind. When you come to look at it in the light of these rules that we may apply to find it it becomes easy, it becomes simple, it becomes easily ascertained. We generally recognize the fact that a gun is a deadly weapon, and that if used in a certain way it will take life, or it will jeopardize life. While that is so it is inanimate, it has no will of itself, and therefore common observation produces the conclusion that when a man presents it at you, or
356 any human being, and fires it, and death ensues as a consequence from the act of drawing, presenting, and firing, that the man intended that result. That is exactly the conclusion you would come to if you would see an occurrence of that kind done in that way, and it is exactly the conclusion you are authorized to come to as a reasonable men in the jury box when you have a case illustrated by such facts as these, and when such evidence is presented before you you have a right to come to the same rational conclusion that you would come to as reasonable men if you would see a transaction of that kind with your own eyes. You have not seen this transaction occur, but you have applied one of the senses to it; you have heard ... occurred, and you have a right to come to the same conclusi... intelligently and just as reasonably as you would if you ... occurrence yourself.

"If an act of the character named produces death because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now, intent is something that can only be found by inference. It can only be found from the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing mind that the law holds every man to know the nature of the weapon that he uses, the purpose for which it is constructed, and the results that naturally, and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason when a man presents a
357 gun or a pistol at another and shoots it at him, the law says that he intends to kill him, because the killing is a result that is natural, or probable, or reasonable."

"Where do you get a foundation for a conclusion of that kind? You go to exactly what you would as reasonable men, and what all other reasonable men do when such facts are presented and you would conclude that the party intended the death of the man he shot at. You could not help but arrive at that conclusion; you may sometimes attempt to resist such a conclusion, but the truth is of such power it will find its way to the minds of reasonable men, it will drive out all prejudices, all passions from our minds, and it will produce a conclusion that is warranted by the truth, fight against it though we will.

"A word in this connection as to how you may find that the act was wilfully done.

"The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own act. If one voluntarily or wilfully does an act which has a tendency to destroy another's life the natural and necessary conclusion from that act is that he intended so to destroy such person's life.

"Now, shooting at a man is the doing of an act which has a direct tendency ordinarily to destroy his life, and the natural conclusion from the act of shooting is that he intended to destroy such person's life.

"So, if the direct tendency of the wilfull act is to do another
358 some bodily harm and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm is a necessary conclusion from the act.

"You take the act done. Now, your common observation teaches you that a gun or pistol fired at another within shooting distance of him will put his life in danger; it may probably destroy it. For that reason, because of the character of an act of that kind, all you have to do to find whether the party intentionally or wilfully took the life of another is to find out whether he fired at him wilfully or intentionally, because of the deadly character of an act of that kind, and because of the probable con-

sequences that may follow, or which usually do follow, from it. From that state of case alone you may infer that the party intentionally or wilfully killed the party he is charged with killing. In this case, if the defendant presented his pistol and fired it in such a way as to take the life of James Gentry, from the presentation and firing of that pistol it would be your duty to infer, as reasonable men in the performance of your duties under the law, that he wilfully took the life of James Gentry. That is the first proposition having relation to the condition of mine you are to ascertain to find out whether this killing is a killing that can be denominated or characterized as murder."

5. In this (page 18): "But the trait which distinguishes murder from any other kind of killing is known as malice aforethought.
359 "Now, in the examination of this question—of this proposition confronting us—if we can find that it is not a case of self-defense, and if we can not find, secondly, it is a case of manslaughter, we are necessarily brought to the conclusion that it is a case of murder, because it must be one of those three."

6. In this (page' 22 & 23): "The motive that prompts him then is to defend himself, but when he contemplates a purpose to take another's life without its being necessary to defend himself, he can not set up anything, even in mitigation of an act of that kind, because this element of murder known as malice aforethought exists, which grows out of a state of premeditation—a state of case where he thinks of it beforehand—and if he thinks of killing beforehand and kills in such a way as that the act of killing can not be mitigated or justified, the fact that he thought of it beforehand, the fact that he prepared to do it beforehand, shows that it was done deliberately, that it was done with premeditation, and it consequently grew out of a wicked condition of mind that entertained a purpose to produce a deadly result without just cause or excuse or in the absence of mitigating facts or circumstances.

"When a man forms a deliberate intent to kill another, that is a malicious killing." "It does not necessarily import any special malevolence towards the individual slain, for it also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty and a mind deliberately bent on mischief. It imports premeditation; therefore there must *be* logically be a period of prior consideration—that is, prior consideration of the purpose to do the act which produced death—but
360 as to the duration of that period no limit can be arbitrarily assigned. The time will vary, as do the minds and temperaments of men and as do the circumstance' in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the event' of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so shor but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice."

7. In this (page 23–24): "Malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse,

and in the absence of mitigating circumstances, which produces death, it is murder, whether it is grown out of special purpose or animosity, or specific design to take life, or the purpose to do some other act of wicked and malignant and criminal nature, which because of its nature and the way it is done a human life is taken; malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse which results in murder. It evinces a formed design to do such mischief as may deprive a fellow-being of life."

8. In this (pages 26–27): "That ought to be modified, in my judgment, so that it would be that it is not to be inferred from the use of a deadly weapon but it is to be inferred from the use of a deadly weapon when there is an absence from the case of that which would give the party the right to use it under the law of self-defense, or that
361 would give him the right to use it and then ask that his actions be mitigated or reduced in grade from murder to manslaughter. If both of the conditions are eliminated from the case, and he uses a deadly weapon so as to produce death, in the language of the proposition that I have already given to you, you may from the use of such a weapon, and in that way, under such circumstances, infer that the act of killing was done with malice aforethought—the doing of a wrongful, illegal act which kills, without just cause or excuse, or in the absence of mitigating facts. If there is an absence from the killing a case of self-defense that we can only know by the light of the truth as we find it, and by the light of the law defining that state of case, and there is an absence from the case of that other condition which is denominated as a crime, and which occupies a midway position between the crime of murder and a case of excusable homicide called a state of case named manslaughter—I say, if that condition is out as well as the other, there is nothing in the case but a case of murder, because the facts showing the state of case existing would necessarily show the doing of a wrongful act without just cause or excuse, or in the absence of that which would justify or mitigate."

9. In this (pages 27-28): Anyt'ing that shows deliberation, anything that shows premeditation, a premeditated purpose to do a wicked or wilfull act that might result in death, is evidence that may be considered by the jury, going to show the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly existed in the mind of the parties or party who killed, or the purpose to do a wilfull act that might result in death is shown by the action of the party to have had a previous existence, an exist-
362 ence prior to the time of the killing, that shows the existence of malic' aforethought. Therefore there is an absence from the case of that state of facts which goes to show that the party had a right to do what he did. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party entering upon whatever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful way, the fact of so preparing the weapon, and selecting it for the use in that unlawful and wicked way, in a way not authorized by the law, in a way that the law would not mitigate the act if done—I say, the fact of the selection and preparation of a deadly weapon and the use of it in a deadly way, after he

has selected it and prepared it, shows the existence of a state of premeditation, shows that he thought of the purpose to kill wrongfully and unlawfully before he executed it, and when that state of case exists there is a condition of malice aforethought which goes to characterise the act as done. It shows the purpose to do a wrongful act without just cause or excuse. You may go to the killing. You ascertain how the killing was produced; you ascertain the character of the weapon used; you find out whether it was deliberately and wilfully used at the time. You find out whether it was used under such circumstances or in such a way that he didn't have a right under the law to use it, or that he would not have a right under the law to ask that the result produced by the use of it be classified as a result of less criminality than murder; and wherever you find that he wilfully and intentionally selected and used a deadly weapon under such circumstances you necessarily find the case was murder."

363 10. In this, that the court instructed the jury as follows (pages 29 to 31):

"Then we are to see whether the evidence as we may find it to be true fits that state of case, whether it shows that state of case as existing here. It is necessary, in order to ascertain this properly, that we go to the law of self-defense to find out what is meant by it. We would naturally have a general idea of what the law of self-defense means; we would instinctively be brought to the conclusion that one man could not kill another unless his life was in such peril as that it was necessary for him to do that act in order to avoid death or great bodily harm to himself, when he was in the right. That is the instinctive conclusion we come to without ever going to the legal definition of law of self-defense. It is a consciousness that is planted in the heart and mind of every man, his knowledge of right and wrong, which teaches him that for a slight injury, for mere words, or for anything that does not then and there throw such peril around the life of the party that slays or threatens him with great bodily harm as that he can not escape from that peril except by taking the life of the party who was the author of that peril—I say we may come to such a conclusion from our knowledge of right and wrong implanted in our hearts and minds by the laws of nature. Yet, for certainty, that we may not be led astray by the circumstances that surround the case, it is necessary that we should go to the law and find out what this definition is of the law of self-defense, find out when it says that we may slay our fellow-man; and it is by the definition of the right as given by the law that we are to be governed.

364 This is the right that exists that is sometimes called the law of necessity, a right that must exist from necessity. It is the necessity of the case tha' produces the right as it may be in the hands of a particular individual. If the necessity is absent we can not stretch it as a rubber blanket, to cover a case and say we stood upon the law of self-defense. We can only stand upon it when the facts surrounding us give us the right to stand upon it. We can not place ourselves there; it is the law that places us there. It is the law of the land that gives us the right to stand there. We can not place ourselves there because of a bare state of fear that may control us, which may be upon our minds, and which may be operating upon us at the time, but there must be that condition which is expressly pointed out by the law as a condition that will give us

and in the absence of mitigating circumstances, which produces death, it is murder, whether it is grown out of special purpose or animosity, or specific design to take life, or the purpose to do some other act of wicked and malignant and criminal nature, which because of its nature and the way it is done a human life is taken; malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse which results in murder. It evinces a formed design to do such mischief as may deprive a fellow-being of life."

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the right to slay our fellows, or to act in the position of judge, jury, and executioner all at the same time, to determine what the laws is, find out what the facts of the case are at the time, make an application of that law to these facts, ascertain the result in the shape of a verdict, enter up a judgment upon that verdict, and then act as a marshal or sheriff and execute the man all at the same time. That is a great right; that is a grave responsibility; that is a concentration of mighty power in the hands of any individual. Mighty as it may be, great as it may be, and responsible as it may be, it is still a right that exists in the hands of a citizen to be given him when he is entitled to it, and in no other case."

11. In this, where the court instructed the jury as follows (from page 31 to 33):

"Now, what is the very first proposition we start with under this law? That the party who invokes it must have been doing at the time
365 of the killing that which he had no right to do; or at the time that he was attacked by the party slain he was doing that which he had right to do. If he was and was attacked by another under circumstances which denoted an intention to take away his life, or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or to prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, that is the first rule to be applied to a real or actual condition, and a condition, too, that imperils the life of the party or puts his body in danger of receiving great injury. In this case, under this proposition, at the time that he shot Gentry, the life of Famous Smith, the defendant, must have been in deadly peril, or he must have been in danger of receiving enormous bodily harm, which must sprung from the actions of the party at that time, or, in other words, Gentry must have *mad* made such an attack upon him as indicated from the way it was made, or from the character of that attack, that he intended then and there to take away the life of the defendant or to inflict upon him some enormous bodily harm. And what is meant by that? Not a mere break of the skin, but some harm that might produce death when that harm was inflicted upon the body. If Gentry was doing an act of that kind, or was about to do it, to do it so soon as that there could not be any escape from the result that he was then contemplating, the defendant may then lawfully kill Gentry. When? Anyhow? Just because he had done that? No, not at all. It does not say that. That is not the law. It says, provided he used all the means in his power to otherwise save his own life or prevent the intended harm, such as retreating as far as he can or disabling his
366 adversary, without killing him, if it be in his power. That is what must ensue in order to give him the right under this proposition to exert this law of self-defense. The danger from Gentry may be deadly; it may be an attack that the defendant did not bring upon himself, but it must be deadly, and it must be an attack which from its nature, from its character, from the way the party is seeking to execute it, that it would indicate to the mind of a reasonable man situated as was the defendant that the purpose of Gentry was then and there deadly or to do great bodily harm. Now, if he could not escape from that danger by getting out of the way of it, or he could not escape from it by the use of less violence than he did use, he may use deadly violence; but, if he could have avoided it,

it is his duty to avoid it; but if he could not have avoided that by the exercise of reasonable care or if he could not have avoided that by the use of less violence than he did use, he would have a right to take his life. Now, of course you know without my telling you that before you can apply this rule you must find a state of case to which it can be applied, and you are to look to the reasonableness and probability and consistency of these facts to see whether that *as* the state of case or not."

12. In this, in instructing the jury as follows (page 33): "If that was not the state of case, or the state of case did not exist as denominated under this other proposition, and that state of case undertaken to be sustained by testimony, by the statement of pretended facts, it would necessarily follow that it would be the invocation of false facts, and such an invocation as that, of that kind of testimony, instead of doing the party who calls upon it any good, is a foundation for a presumption against
367 him, because the law says that he who has the truth upon his side, he who has innocence upon his side, does not fly to falsehood; he does not create a state of case where he relies upon a set of fictitious facts. He depends upon that which is his best friend, his best servitor, the truth, to protect him."

13. In instructing the jury as follows (page 34): "If Gentry attacked this defendant in such a way as to indicate from the nature of that attack a deadly purpose upon his part, or a purpose to do him enormous bodily harm, and was then and there engaged in executing that purpose, and there was no way of avoiding it by getting out of the way of it, by retreating when he was on horseback, or by avoiding the consequences by the exercise of less violence than shooting him to death, and he repeatedly shot at him when he could have crippled his horse—if that was the state of case, and he could have saved his own life by the exercise of less violence than deadly violence, he is required to do that under this law. That is what it says."

14. In instructing the jury as follows (page 34): "Now, you naturally inquire what the rule means; whether one man, if he thinks there is danger, can kill and be excused in it. Let us see how uncertain that rule would be. How many men who *are* brought into courts of justice for trial would not say that they thought that they had a right to kill. How much security would there be from the man of crime if such was the case. The law would loose its protecting power and would become a mockery, a delusion, and a sham, by all condemned and by all despised instead of worshipped."

15. In instructing the jury as follows (page 37): "A killing that is done wilfully, that is done unlawfully or wrongfully, and that
368 ther' is not attending it that which is a characteristic of murder known as malice aforethought, is defined by the law as manslaughter. If that does not exist, and the state of self-defense does not exist, then necessarily there exists a case of murder."

16. In the following instructions to the jury (pages 37–38):

"The law says that voluntary manslaughter usually grows out of a state of case where there is an affray, where two men, for example, are engaged in a fist and skull fight, where neither of them with the means they start in to use and are using at the time are capable of inflicting deadly injury, but it is an ordinary fight as men only fight. If one of

them und'r such circumstances should suddenly, without any previous preparation of the same, use a deadly weapon so as to take the life of the other, the law would mitigate that because of the condition of the mind of the party, which to some extent, was caused by the act of the other party. It commisserates his condition and contemplates that he did not do the act while his mind was in that state of deliberation where he was capable of premeditation; but, in a case of that kind, if he prepares a weapon with the determination to use it if occasion offers, he may be in an affray, may be engaged in an ordinary fight with his adversary, the preparation of the weapon beforehand together with the contemplation to use it in a deadly way would put him in such an attitude as that his act of killing would be characterized as murder, and could be characterized in no other way, because there is deliberation, there is a contempleted purpose to do a deadly act, there is a design upon his part to take the life of the party if occasion offers, and that is not a state of case which can produce manslaughter."

369 17. In instructing the jury as follows (page 38): "If it is murder you must name it as such, and you have no discretion in the matter. If it is manslaughter you must name it as such. If it is no crime at all you must name it as such."

18. In the fol'owing instructions to the jury (page 39–40): "Now, in this connection, if it be true that the deceased attacked this defendant in such a way as to indicate a deadly purpose upon his part, and that that attack could have been turned aside by the use of other means than these violent and deadly means used by the defendant, and he did not resort to these means when he could have done so, that would be a state of case where the law of manslaughter would apply. That would be a state of case where he would become guilty because he did not use the means at hand to protect himself from violence, but resorted to this violent method and took the life of his adversary. The law says when he does that he is guilty of manslaughter. The law says when he uses more violence than is necessary, if he could cripple his adversary, if he could overcome the purpose on his part that he was then and there executing that was deadly in its nature, by doing something that fell short of taking his life, he must do it, and if he took his life when that was the state of case the law says that it is manslaughter. Now, the law says again that if a man arrives at a conclusion which is a negligent conclusion, and he kills in consequence of that when it was necessary for him to kill, the law says he would be guilty of manslaughter."

19. In the following instructions to the jury (page 40): "The man slain must have been making an attack of a deadly character upon this defendant. That is the first thing to find in order to reduce
370 the grade of the crime to manslaughter. Then that he could have turned that aside by the use of less violence than he did use. That is the second thing required to be found. If the man killed was not making an attack upon him, and he slew him by a violent act by shooting him, and shot him again and again, that is murder. There is nothing else in that."

20. In instructing the jury as follows (pages 40 and 41): "But it requires to mitigate the crime that the attack under this proposition was actually and really made, and that it was a deadly attack made by the man slain, but that the defendant was at fault and become criminal because

he did not use the means that the law says he should use to turn aside that deadly attack, either by the use of means of a less violent character than he did use or by getting out of the way of that danger if it was in his power. In either state of the case he would be guilty of manslaughter. Now, under the other proposition of apparent danger, there must be existing in the shape of a violent act upon the part of the man slain at the time that he was slain that would give a party the right to kill him if there was no escape from that apparent danger; but if there was means of escaping from it, either by the exercise of less violence than he did exercise, or by getting out of the way what seemed to be real danger, his duty was to do that, and he would become guilty of manslaughter then. But in this case, as in the other, the man killed must have been doing that which indicated a deadly purpose at the time, and the defendant becomes at fault because he did not exercise less deadly means than he did exercise when he could have done so with due regard to his own safety. In either case his offense would be mitigated to manslaughter because of the negligent conclusion he arrived at. He must have some basis for that conclusion; he must have some foundation for it.

371 It must not be a thing which he generates in his *own* mind; he must have that confronting him which would ordinarily mislead a reasonable man, but it would not mislead him if he would do his duty and comprehend the facts as they existed, but that a reasonable man would be misled if he was negligent under the circumstances, and then he would be guilty of manslaughter. But in that state of case the party slain, in order that the defendant may have his crime reduced to the grade of manslaughter, must have been doing something that indicated a fatal purpose, though it may have been misleading in its character, though it might have led to a different conclusion if it had been correctly observed by the defendant."

21. In the following instructions to the jury (page 42):

"Under this proposition I have given you the act of a deadly danger to the defendant at the hands of the man slain must have really or apparently existed, and from the existence of it the defendant must have been able to see deadly danger, real or apparent, growing out of actual physical violence that was being done by the party slain at the time he was slain. If he was not doing anything of this kind of course there is no foundation for the rule that would reduce the grade of this killing to manslaughter."

22. In this in instructing the jury as follows (pages 44–45): "You may take the statements that are in favor of the defendant, and you may believe them if such belief is authorized by the light of the facts and circumstances, but if not authorized in your judgment in the light of the facts and circumstances you are not to believe them, because of their unreasonableness, because of their unnaturalness, because of their improbability, and you are at liberty to reject these facts and circumstances which may be in his favor, and believe those which are against him."

372 23. In instructin' the jury as follows (page 45): "You may then take the evidence that may weigh against the defendant, and you may believe that and you may reject that which is in his favor if you feel authorized so to do from the light of the law and the testimony given in the case."

24. In the following instructions o' the jury (page 45): "It is your duty to take into account the statements made by the defendant shortly after this occurrence. You are to see what his statements of how this killing occurred were at the time; you are to see that they come to you in a credible shape, in a reliable way; you are to weigh, contrast, and compare them with his statements made upon the stand as witness, and as an interested witness—as a witness having greater interest in the result of this case perhaps than anybody else."

25. In instructing the jury as follows (page 46): "The rule given by the law is based upon the ordinary conduct of men, and it says that if a man who has taken human life is conscious of innocence as a rule his conduct and his actions under that consciousness of innocence will be different from the actions and conduct of a man who is conscious of guilt—who is conscious of killing without a right, of killing without authority of law. In the one case for his own vindication, for his own protection, for the good will and the estimation of his fellowmen he seeks vindication at once; he seeks an uncovering of his act at once; he seeks an investigation of his conduct at once. In the other case because he is fearful of the consequences, because he is conscious of his act of guilt, he becomes a
373 fugitive, it may be, from justice, he flies from a trial, he does not court an investigation from his fellows, he is not willing that his case shall be presented to twelve jurymen of his country, and all the facts and circumstances passed upon, and therefore the law says it is your duty to take into consideration the fact that he was a fugitive from justice, if he was such."

26. In the following instructions to the jury (pages 47–48): "Now, I will not permit the occasion to pass without saying that no man of ordinary intelligence, that no man of ordinary information, becomes a fugitive from justice from this court unless he fears the consequences because of the act done by him, because the court, and the method of trials before the juries here, and the impartiality and deliberation of these proceedings is well enough known to every resident of that Indian country of ordinary intelligence that that can not be justly attributed as a motive for his actions. A man comes here and he is tried deliberately and impartially notwithstanding the slanders and villifications that have been hurled against the court and its officers; he is heard and tried deliberately and dispassionately; the law is given in his case; it is given thoroughly, seriously, deliberately, and truly without regard to fear of consequences from influence of any source. If a person flies from justice, keeps out of the way of the officers even in the community where he lives, he is a fugitive from justice."

27. In instructing the jury as follows (pages 48–49): "He may explain it; he may do it; he might get out of the way because he feared a mob, a mob of excited people, and if such was the case he would have a right to offer that; he has a right to offer any explanation that is reasonable to show that his conduct did not grow out of a dread of a trial before a jury of his country, but if he
374 has not explained that and explained it in a reasonable way, the fact that he was a refugee from justice, if you find it to be such from the time of the killing until he was arrested, or a large part of that

time, you have a right to take that into account against him upon the principle I have already named, that he who is conscious of innocence, who is conscious of having killed a man in self-defense, the usual rule of human conduct is that he will seek an investigation, that he will seek to have a jury of his country pass upon his case to vindicate him, because they can do that, they will be anxious to do it; they would be gratified to do it, and it would be their duty to do it. On the contrary, he being the only positive witness to the occurrence that can be produced in court, if he is a fugitive from justice for this time, and has not explained this conduct in any of the ways I have enumerated, the fact of his being such a fugitive is a presumption against him which you have a right to take into consideration together with the other circumstances in this case. It becomes a circumstance in the case to be weighed by you, to be passed upon by you.

28. In instructing the jury as follows (pages 49–50): "If a man uses deadly threats, and they are proven, these threats standing alone cut no figure whatever in the case, except as you take them into account when you are hunting for a motive upon the part of the defendant for killing the man. I will read you briefly what the law says upon this question:

"Courts of justice everywhere agree that neither the bad character of the deceased nor any threats he may have made forfeit his right to life, until, by some actual attempt to execute his threats or by some act
375 or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

29. In the following instructions of the court (page 52): "The character of the defendant has been offered in evidence before you. That is not a circumstance that is given to you which gives you the right to acquit upon it, nor is it given to you that you may have a right to convict upon it if it was a bad character before this occurrence. You simply take it into account together with the other facts and circumstances, weighing it as a circumstance together with the other evidence."

30. In instructing the jury as follows (page 52–53): "If you find beyond a reasonable doubt the truth of this charge I ask you to convict this defendant, because if he committed the crime of murder there by the taking of this man's life when he was doing nothing that would give him a right to do so, or to say that it could be mitigated, there is nothing else but murder in it, and you so find; it would be your duty to say so."

31. In the following instructions to the jury (page 55): "In other words, if from the whole of this evidence you find to be true there is driven out of the case all doubts for which good reasons can be given, there is not a real substantial doubt in the case, because it is only that kind of doubts we are to regard. We are not to consider every doubt which confronts us; they are always before us on every proposition in life; they are always to be taken into account only when they are of that character when they would influence the mind of a reasonable man."

376 32. The instructions of the case are argumentative, and aid the Government's case unfairly by showing a bias of the court in favor of conviction.

33. The instructions of the court are confusingly lengthy.
34. The testimony shows that deceased and defendant were both Indians, and the court had no jurisdiction of the cause.

FAMOUS SMITH,
By THOS. H. BARNES and
WM. M. CRAVENS,
His Atty's.

(Endorsed on back:) Filed Aug. 23, 1893. S. Wheeler, clerk. By I. M. Dodge, D. C.

378 *Petition for writ of error.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
FAMOUS SMITH, DEFENDANT. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, Famous Smith, respectfully represents that at the term, 1893, of this court he was convicted of the crime of murder, and this court has pronounced judgment and sentence of death upon him on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings of the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States may be issued by you under the seal of said court, removing said cause and the record therein to the Supreme Court of the United States, in order that the same may be there examined, and if error be found that the judgment and sentence against him may be reversed.

FAMOUS SMITH,
By THOS. H. BARNES and
WM. M. CRAVENS,
His Attys.

Filed Aug. 23, '93. S. Wheeler, clk. By I. M. Dodge, D. C.

379 *Poverty affidavit.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
FAMOUS SMITH, DEFENDANT. } Murder.

I, Famous Smith, the defendant in the above-entitled cause, do solemnly swear that I am not possessed of sufficient means and am unable

to procure the same so as to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it may be prosecuted in forma pauperis.

(Signed) FAMOUS (his x mark) SMITH.

Witness:

J. M. BAXTER.

Sworn to and subscribed before me this, the 22nd day of Aug., 1893.

[SEAL.] H. A. WOESTMAN,
Notary Public.

(My com. expires Feb. 25, '97.)

Filed Aug. 23, '93. S. Wheeler, clk. By I. M. Dodge, D. C.

380 UNITED STATES OF AMERICA, ss:

The President of the United States, to the honorable judges of the circuit court of the United States for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment a plea which is in the said circuit court before you, or some of you, between The United States and Famous Smith, a manifest error hath happened, to the great damage of the said Famous Smith, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23rd day of August, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Ark.

Allowed by

Justice of the Supreme Court of the United States.

381 UNITED STATES OF AMERICA, ss:

To James F. Read, United States district attorney for the western dist. of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit

court of the United States for the western district of Arkansas, wherein Famous Smith, under indictment for murder, paintiff in error, and the United States, defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable J. C. Parker, judge of the district court of the United States, this 23rd day of August, in the year of our Lord one thousand eight hundred and ninety-three.

J. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

382 On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I, James F. Read, U. S. district attorney for the western district of Arkansas, do hereby acknowledge service of the within citation this 23rd day of August, A. D. 1893.

JAS. F. READ,
U. S. Atty. West. Dist. Ark., by Asst.

383 UNITED STATES OF AMERICA,
Western district of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of U. S. vs. Famous Smith, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 1st day of September, A. D. 1893.

[SEAL.]

S. WHEELER,
Clerk.
By J. M. DODGE,
D. C.

384 (Indorsement on cover:) Case No. 15387. Term No. 1003. Famous Smith, plaintiff in error, vs. The United States. W. Arkansas. C. C. U. S. Filed September 9, 1893.

Office Supreme Court U. S.
FILED.
NOV 23 1893
JAMES H. McKENNEY,
CLERK.

Case No 15387. Term No. 1003.

IN THE

Supreme Court of the United States.

FAMOUS SMITH, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,
Counsel for Plaintiff in Error.

REPUBLICAN JOB ROOMS, FORT SMITH, ARK.

IN THE

Supreme Court of the United States.

Case No 15387. Term No. 1003.

FAMOUS SMITH, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

At the February Term, 1893, of the Circuit Court for the Western District of Arkansas, plaintiff in error was indicted, charged with the murder of one James Gentry, alleged to be a white man, and not an Indian, on the 1st day of August, 1883, in the Cherokee Nation, in the Indian country.

GEORGE CARTER.

"I was at Webber's Falls and saw Gentry's body after it was brought there. I saw a wound in the neck. I think it was on the left side, but cannot be positive. Saw a wound in the arm between elbow and shoulder; don't remember just where; and saw three in his back. If these shots came through don't remember it. Think the shots in back were not scattered much. Think the one in arm went into body, but can't be positive."—*Printed Record, pp.* 31-35.

J. H. VESTAL.

"I lived about a mile from the place where Gentry was killed. On the day he was killed I heard five shots in that direction. They were in rapid succession. Three first and then two. Did not see Smith for two or three months after this. I think he was scouting. Since then he has been around all the time, tending his gin part of the time. He would get out of the way when he heard deputy marshals were coming. He had some marshals employed, working for him. They were a different set. Gentry told me he was an Indian. I supposed a Cherokee."—*Printed Record, pp.* 35-38.

J. W. RICE.

"I knew Gentry. Got acquainted with him the Fall before he was killed. He was then working in a mill in the Choctaw Nation. He claimed to be a Cherokee Indian. Said he had lived in Southern Arkansas; had a step-mother, but no other relatives down there. Was working three-fourths of a mile from where he was killed; heard four or five shots, two

first and then three others."—*Printed Record, pp.* 38-41.

IRVING VORE.

"I am a Cherokee. I was an Indian policeman at the time Gentry was killed. I saw Smith an hour or two hours after he killed Gentry. He was at my house; came there to see me I guess. He told me he had killed Gentry. He said he and Gentry were this side of his house and got in a fuss and Gentry commenced cutting at him and cut him two or three times on the arm. I saw two or three cuts in his coat on his left arm, and he said he spurred his horse out of the way twice and told Gentry if he did not quit he would have to kill him. That he told him to stop twice; that Gentry would not do it and was cutting at him all the time, and he pulled his pistol and shot him. At that time Smith was also an Indian policeman. After the killing Smith staid around awhile and then went away, to Texas as I think. He came back in a short time and afterwards went to California awhile. Can't say how long he staid or just when it was. I guess he was on the scout. Since he came back from California he has been attending to his farming and stock raising. I have seen him with deputy marshals. A part of the time he would not scout. He went to Webber's Falls and to picnics. I knew Gentry but was not much acquainted with him. He claimed to be an Indian."—*Printed Record, pp.* 41-48.

J. A. McDANIELS.

"I am sixty years old. I had a conversation with Famous Smith about ten years ago; had two or three con-

versations with him about the killing. He said he killed Gentry. He said Gentry said he was going to whip him. I don't know whether he spoke of a quirt and knife or not, it has been so long ago I can't recollect. If he spoke of the knife and quirt I don't recollect it. Gentry boarded with me two or three months. He left saying he was going to Smith's to have a settlement."—*Printed Record, pp.* 49-51.

JOE FLYNN.

"I was at Webber's Falls the evening of the day that Gentry was killed and saw his body. Saw three wounds in shoulder, on shoulders or between them; did not see any wound in neck or arm and did not see the front part of the body." *Printed Record pp.* 51-57.

W. MART MILLER.

"I saw Gentry's body at Russell's place the evening of the day he was killed. I only noticed one wound. It was in the neck; went through. I think it went from the side of the neck and went straight through."—*Printed Record, pp.* 58-59.

R. E. BLACKSTONE.

"I was conducting a store at Webber's Falls at the time Gentry was killed. He was working for me. I saw defendant on the day Gentry was killed; he came to my store about 2 o'clock. I think he bought some cartridges. He went outside with Frank Vore and I did not see him again.

"Don't know whether Gentry was an Indian or a white man. I heard that he was not allowed to vote; did not learn the reason.

"Saw Ned Smith with a knife that was said to have been found at the place where Gentry was killed. Looked like Gentry's knife."—*Printed Record*, 59-63.

MILLARD FILMORE.

"I am a Cherokee and live within three or four miles of Webber's Falls. I was one of the judges of the election there in 1883. I knew Jim Gentry; had seen him around there that spring and summer. He was not permitted to vote. Blackstone, the other judge, told him he had not been in the district long enough. He told him he was satisfied he was an Indian. There was no argument about that at all hardly."—*Printed Record*, 63-67.

FANNIE STARR.

"At the time Gentry was killed I lived 18 miles from Webber's Falls. I saw defendant next morning after the killing. He came to my house and I asked him what was the trouble and he said he had got into trouble the morning before and killed Jim Gentry. He said they had got into some trouble about a horse. That Gentry went up to George Vann's after his clothes, and when he came back defendant had gone down the road, and Gentry came on, the difficulty took place, and Gentry was striking at him with a loaded quirt and he shot him, three times I think."—*Printed Record*, 67-72.

DEFENDANT'S TESTIMONY—FAMOUS SMITH.

"I am 40 years of age, an Indian and a citizen of the Cherokee Nation. I was raised and lived near Webber's Falls. I

knew Jim Gentry, he came into the Canadian District, in the Cherokee Nation, in April, 1883, and began working for me. Had seen him several times before that in Choctaw Nation, just across the river. He was logging out there.

"He logged for me, hauling to the mill at Webber's Falls. He first worked for me at $1.00 per day, and then I let him have a team for half of what he could make; we got along very well until a short time before the trouble came up. I turned him over some horses and he promised he would not ride them hard; he got so he was riding them hard; was out every night and quit work, so I complained to him about it. I then told him he must not ride the horses at all; and I went away from home and he caught one of the horses and rode it off; went down in the Choctaw Nation and was gone about a week and rode the horse down. I saw him on the day of the election and told him to take the horse home and turn it loose. I did not see him again until the day he was killed. The election was on Monday, and on Thursday he came to my house. He came and said he was going to quit work there and go to work for Blackstone. He had bought a saddle and was owing $7.50 on it, which I had stood good for and had to pay, and I asked him about that. He refused to leave the saddle with me as security, but finally agreed to see if Blackstone would not stand good for it. He then went up to George Vann's. I was eating dinner when he came back; he said we will go down to the Falls and see Blackstone about standing as security. I did not want to go but as he insisted I finally agreed to do so. So we got on our

horses and started down the road; he commenced quarrelling at me, and cursing, we went on until we got 100 yards of Russell's house and he kept cursing me about the horses; at last I told him if that was what he wanted me to go to the Falls for I would go back home. When I stopped my horse to turn back he went on a little ahead and turned his horse facing me and told me to come on and go to the Falls, and I told him I did not want to fuss with him and would go back home. He then said I had to go. That he had been wanting to get hold of me for some time and started at me with a knife. I had a pistol and drew it out and told him to stop; he cursed me and told me I would not shoot and made at me with a knife and struck at me with it. I knocked the lick off and he cut at me again and I shot. I shot twice and his horse dodged back. He then run right up to me on the horse and my horse dodged back and he kept coming with the knife, and I shot twice or three times more. His knife caught in my sleeve and cut it. When I shot the last time his horse ran with him down the road 25 or 30 steps and he fell off. I then turned around and took a trail and went to Webber's Falls. I went in the store and got some cartridges and told Frank Vore about the killing. I told him Gentry was cutting at me with a knife and tried to kill me and I shot him. I then went from there to Mrs. Vore and saw and talked with Irvin Vore. I went from there to Tom Graves and the next day saw Fannie Starr. I told her about the trouble, that Gentry was trying to kill me, was cutting at me when I shot him.

"I staid around home until the 11th of November, and then

went to Texas where I remained until the next October, when I returned home; and as my health was bad, on the advice of friends, I went to California in the following February. I staid at home in the mean time. I returned from California the following November, 1885. Since then I have been around home attending to my farm, logging a part of the time and running a gin part of the time. I was frequently with deputy marshals during this time and several have worked for me.

"I have not been out of the country since coming back from California in 1885, except twice when I came here to Fort Smith on business. I was a United States Indian Policeman at the time Gentry was killed." *Prinied Record*, 73–96.

J. S. DOWNER.

"I am a white man. I lived at Webber's Falls at the time Gentry was killed. Mr. Lackey, Mark Scales and I washed and dressed Gentry's body. No one else assisted.

"There was one wound in the left shoulder, on the outer part and near the point of the left shoulder, one in the neck on left front side and went through, and one in the breast to the left of the median line just below the breast bone. It went through from front and came out under left shoulder. Three shots were all there were on the body." *Printed Record*, 96-102.

HENRY OWEN.

(Same.) *Printed Record*, 102-105.

ROBERT LACKEY.

(Same.) *Printed Record*, 105-112.

NED SMITH.

"I was clerking for Mr. Blackstone at Webber's Falls at the time Gentry was killed. I saw Famous Smith at the store on that day. He had a conversation with Frank Vore. Soon after Smith left I learned of the killing from Vore. I was at the place where Gentry was killed the next morning. Louis Crapo was there at the same time. We went there to see what we could find out. Found blood where Gentry had fallen off of his horse. Twenty or thirty steps towards Famous Smith's house from where the body laid, and about two feet from the edge of the road on the line of horse tracks that turned out of the road and passed along near it I found a knife. The knife was half open; it was three-bladed, a big horn-handled knife, one long blade marked "Cattle knife," ane short blade marked "Tobacco Knife," and one little blade. I kept the knife two years and lost it." *Printed Record*, 112-123.

LOUIS CRAPO.

"I was living at Webber's Falls at the time Gentry was killed. The morning after he was killed I went up to the place where it occurred. While there examining the ground Ned Smith found a knife lying by the side of the road. I saw him pick it up." *Printed Secord*, 123-127.

RICHARD SCOTT.

"I lived at Webber's Falls at the time Gentry was killed. I saw him frequently. He was about there three or four months before he was killed. He claimed to be a Cherokee Indian and looked like one. Everybody seemed to think he was an Indian.

On Saturday before Gentry was killed I was at Webber's Falls and Gentry was there also. I had a horn-handle, three-bladed cattle knife and I was whittling with it. Gentry took the knife out of my hand and said: "What are you doing with my knife?" and I says, "I guess it is not yours," and he says, "I have one just like it; they are good knives, aint they?" A short time after this we started walking away together and some one called him back and he still had my knife, and I never saw it or him again.

"It was a buck-horn handle knife, three-bladed, one, the long blade, was branded "Cattle Knife," and another blade was "Tobacco Knife," and then there was a small blade." *Printed Record*, 127-133.

TIMOTHY FIELDS.

"I am a Cherokee Indian, 73 years old. In 1858 I lived near North Fork Canadian, in Cherokee Nation, about six miles from Fish Town, now known as Texana. This was a mile and a half from the Creek line. Kajo Gentry lived near me, his farm adjoined my bottom field; his house was about 1 3-4 miles from mine. In going to my bottom field I had to pass his house. The last time I saw him was in the Spring of 1858. He was a Cherokee Indian; was married, and at that time had two children; his mother was a Cherokee. He was killed by the Creeks near Fish Town. In the summer of 1858 I sold my place and moved into the upper part of the Nation, in the Delaware District. I do not know of my own knowledge what be-

came of his wife and children." *Printed Record*, 133-136.

RICHARD CROSSLIN.

"I am a Cherokee Indian, 60 years old. I knew Kajo Gentry in 1856 or 7 at Webber's Falls, in the Cherokee Nation. He was then 22 or 23 years old. He was considered an Indian and lived in a section of the country called Texana.

"I have known Famous Smith since he was a boy. His character is good." *Printed Record*, 136-137.

W. W. CAMPBELL.

"I am an Indian. In 1851 or 2 I went to a seminary at Tahlequah. I knew a young man there who attended school named Kajo Gentry; he was two or three years older than me. I am now 57. He was considered to be an Indian. Do not know what became of him. Have known Famous Smith since 1867. He was always a law-abiding man up to the time of this trouble and had a good character." *Printed Record*, 137-140.

EDMUND FLEETWOOD.

"I am a Cherokee. I knew Kajo Gentry in his life time. Hewas of Creek and Cherokee blood. I knew James Gentry. Kajo Gentry was his father. I first knew Jim Gentry when he was a small boy at his father's house. In 1871 or 2 he came to my house in the Delaware District and worked for me awhile, three or four months. He was between 15 and 18 years of age at this time. He told me he was a Cherokee and Creek Indian mixed and a son of Kajo Gentry. He was with me when we

got our first payment of ten dollars and forty cents a head that was made to the Cherokees. He was enrolled and participated in the payment. I went with him to Vinita when the payment was made and he got his money. It was a payment to the Cherokee citizens of the Cherokee Nation, and every citizen, red, white and black, drew what was known as bread money. He was at my house in Sequoayah District two or three months before he was killed. He was at my place three or four times while he was at Webber's Falls, and I understood from him that the reason they did not let him vote was because he had not been in Canadian District long enough." *Printed Record*, 140-144.

ROBERT TINER.

"I live three miles west of Webber's Falls. Knew James Gentry. He looked like he was an Indian. A few days before he was killed he came to my house and called me out to the well and asked me if I had bought that mare I had got from Smith that spring to work, and I told him I had, and he remarked that Smith was cutting up about his horse and that if he didn't mind, his damed horse wouldn't do him any good. He was mad when he said this. I saw Smith next day and told him about this conversation." *Printed Record*, 144-147.

MRS. ROBERT VANN.

"I knew James Gentry. I am the wife of Robert Vann. A short tmie before Gentry was killed he was at my house. He said if he had a certain horse Mr. Blackstone had he would blow

a man's life out and leave the country." *Printed Record*, 147.

ROBERT VANN.

"I am a Cherokee; live about ten miles from Webber's Falls. I knew James Gentry in his life time; he was a Cherokee Indian. He claimed that Kajo Gentry was his father. He was frequently at my house before he was killed. On Saturday before he was killed he was at my house and in cutting some corn for his horse he used a pocket knife. It was a cattle knife, had "Cattle Knife" branded on one blade and "Tobacco Knife" on the other and the third was a small blade. I had one just like it and so did Dick Scott. He left my house Monday morning. I had a black horse there and he asked me what I would take for it. I told him I would not sell it as I just had two and didn't want to break the match, and he said if he had the horse he would just kill Famous Smith and leave the country; and in another conversation we had there at that time he said that if he had a little horse belonging to Bob Blackstone, called Dock, he would just blow Famous Smith's lights out and leave the country. On Monday at the election I saw Famous Smith and told him what Gentry had said." *Printed Record*, 147-150

J. W. SPECK.

"I lived at Webber's Falls and knew James Gentry. He looked like an Indian and claimed to be a Cherokee. *Printed Record*, 151.

REESE HILTERBRAND.

"I knew James Gentry. He claimed to be an Indian citi-

zen. The last time I saw him was about two weeks before he was killed. He wanted to borrow money from me and I told him as he was not married he ought to have money all the time. He said Smith always brought him out in debt at the end of each month, that "to-day two weeks I will have a settlement and if he brings me out in debt I will spill blood with him. He further said, "I left one country for killing a damned dog and I could leave another one." *Prtnted Record*, 152-154.

ASSIGNMENT OF ERRORS.

1st. Because the Court erred in instructing the jury, as follows :

"It is charged in this indictment, and it is necessary to be charged to give the Court jurisdiction, that James Gentry was a white man and not an Indian. The meaning of that is, that he was a citizen of the United States ; or, more correctly speaking, a jurisdictional ci izen of the United States. Under the laws of the country every man in it, outside of a few persons who are exempted by the law, whether he is a full political citizen of the United States, or no matter what his relation in that regard may be, is a jurisdictional citizen. For example, we have a class of people who cannot become citizens of the United States because of a prohibition by law. I refer to the Chinese; yet, if a Chinaman kills in the land he is a citizen as far as being subject to the law is concerned ; and if anybody else kills him, in the eye of the law he is a citizen. Practically he is not a citizen, because mobs kill him, and we do not do anything with them,

but laugh at them; but in the eye of the law he is a jurisdictional citizen. So it is with reference to everybody, except the people who are called Indians, and who are living upon their reservations: the place set apart to them as such; and when an offense is committed there in that country by one Indian upon another, the courts of that country alone have jurisdiction. This is now the rule with reference to the five civilized tribes, and the other Indians who are in that country only because the jurisdiction of the Courts of the United States have been extended over what are known as the Wilder Tribes, or the Wilder Indians. Different Courts of the United States have jurisdiction over them. Now, then, that is the meaning of this allegation that James Gentry was a white man and not an Indian, that is, that he was a citizen of the United States. If he was, notwithstanding this defendant is an Indian, the Court still has jurisdiction. In this reservation of jurisdiction to the Indian courts they were not permitted to entertain jurisdiction of cases where upon the one hand a citizen of the United States was affected by the act of an Indian, or the Indian was affected by an act of a citizen of the United States. Now, you are to pass upon this fact just like you are to pass upon any other fact. In the first place, it is recognized by the Executive Department of the Government of the United States now that these Tribes or Nations of Indians, the Cherokees and others, have a local Government of their own; they have what is called an autonomy of their own. And that being the situation that the question as to who is a citizen of that country is a question that they have a

right to settle finally, and it is a question that they are to adjudicate and pass upon it finally as far as it may affect the legal rights of that Nation or its members. Consequently it becomes a material fact in the investigation of a case of this character, when one of the issues involved is as to whether the party is a citizen of that country or not, to ascertain whether he has been recognized legally by the authorities of that country as a citizen thereof. If he had not, that is prima facia evidence for a conclusion that he was not a citizen of that country, because until that is done we haae a right to take it for granted that he stands outside the pale of that Nation. He might still say that he was a citizen, although they had not recognized him, but the failure to recognize him as a citizen is a competent fact to be taken into consideration by you in passing upon that question. Then you are to consider another fact. You are to consider as to where he had been living.

Now, this Court charges the jury that if a man is an Indian by blood, and if he goes out and lives among the white people, who are citizens of the United States and performs the duty belonging to citizenship, or exercises the rights that pertain thereto, that that is evidence upon his part of a purpose to abandon the relation he may have to that country and to its people, and he may abandon it in that way so as to cause him to become a jurisdictional citizen of the United States. If he is simply out temporarily, and is not subject to the duties of citizenship, that is, duties of citizenship that are placed upon a citizen of a State or of a Nation, and he does not exercise any of the rights

belonging thereto—he then may retain his Indian status, he may still be an Indian; but the fact that he is still living out of that country, lives away from that people, and lives among the people of the United States, is a fact that you may take into account as a fact going to show that he was a citizen of the United States. This jurisdiction conferred by the laws upon the Courts of the United States to try for the commission of crimes in the Indian Country, contains, as I have already told you, an exception which is if a crime is committed by one Indian upon another—that is a proviso to the section—if the Government shows a state of case where there has been no recognition, if the Government shows a state of case where a man, as far as the evidence shows, has constantly lived out of that country, and came into it at a late period, you have a right to take these facts into consideration as establishing a state of case that would prove the proposition sufficiently until it is overthrown by evidence establishing a state of case that is different from the allegation contained in the indictment.

You have a right, as it is your duty, to take into consideration upon this proposition all the facts and circumstances; the fact that if he was related there that his relatives took no interest in him when killed; the fact that if he was connected by the ties of blood with that people that that was manifested or made known at the time of the killing, or since that time, and all these usual, probable and natural circumstances that would exist if the proposition is true that he was an Indian, and that would surround him as a member of that Nation. You, in other words,

are to pass upon the question as to whether or not the fact that he was an Indian is a true fact that exists, or whether it is a mere afterthought in this case; and in passing upon that, as in passing upon other propositions in the case touching the guilt or innocence of this defendant, you have a right to take into consideration his own conduct in the premises, his own actions in the premises. There is no evidence here going to show that he was fleeing from justice, as far as it may be asserted by the Courts in the Indian Territory in this case; there is not a syllable of testimony that points in that direction. And if he become a fugitive because of any desire to not appear in this tribunal it becomes material to take into account and contemplate the matter as to whether it would be natural or reasonable that he would become a fugitive from justice for ten years for a trial in this tribunal, as he knew it had no jurisdiction of the case. I say, as I said to you in the beginning, that upon all these propositions that may be asserted or contradicted you are to pass upon these as reasonable men; you are to pass upon their reasonableness and their probability and their naturalness. If they are not reasonable in your judgment as men of sense, men of experience, men of observation of life, if the assertion of a proposition is not a reasonable assertion, if it does not seem consistent of what would be the action of a man situated as was the defendant at the time, you have a right to take that in consideration passing upon the truth or falsity of the proposition. You have a right to do it upon this one just as you have upon all the propositions in this case. It is your duty to find this proposi-

tion of jurisdiction as you are to find the other propositions, beyond a reasonable doubt. If from these facts and from these circumstances you find it beyond a reasonable doubt then you may proceed to investigate the merits of this case. If you cannot find it to that extent the case must fall to the ground, because then no matter what might be the state of case as to whether the defendant is guilty or innocent of a crime it would not be within your province to investigate it upon the merits, and you would not be authorized to find a verdict upon the merits. But if that proposition is sufficiently established in your minds, then you proceed to investigate whether a crime was committed here or not."

2nd. Because the court erred in instructing the jury on the subject of the mental condition of the defendant. *See Printed Record*, 200.

3rd. Because the Court erred in defining malace aforethought, etc. *See Printed Record*, 201.

4th. Because the Court erred in instructing the jury as to the meaning of "willful," etc. *See Printed Record*, 201.

5th. Because the Court erred in instructing the jury indirectly that they should find the defendant guilty of murder. *Printed Record*, 205.

6th. Because the Court erred in instructing the jury on the subject of premeditation. *Printed Record*, 205.

7th. Because the Court erred in instructing jury on meaning of malice, etc. *Printed Record*, 205.

8th. Same. *Printed Record*, 206.

9th. Because the Court erred in instructing the jury on the meaning of murder. *Printed Record*, 206.

10th. Because the Court erred in instructing the jury on the law of self defense. *Printed Record*, 206.

11th. Because the Court erred in instructing the jury on the law of self defense, in ignoring evidence of communicated threats of Gentry against defendant, and in telling the jury that defendant must gather the intention of Gentry to kill him from his acts and conduct at the time of the attack alone. And in telling the jury that before defendant could have been justified in killing Gentry he must have been placed in deadly peril, or in danger of receiving enormous bodily injury from Gentry, etc. *Printed Record*, 208.

12th. Because the Court erred in instructing the jury that an invocation of false facts is a foundation for a presumption against defendant, etc. *Printed Record*, 209.

13th. Because the Court erred in instructing the jury that if Gentry was making a murderous attack upon defendant, it was still his duty to retreat, or shoot Gentry's horse. *See Printed Record*, p. 209.

14th. Because the Court erred in instructing the jury that they should disregard what the defendant might say regarding his belief of what Gentry intended in making the attack. *Printed Record*, p. 209.

15th. Because the Court erred in defining manslaughter. *See Printed Record*, 209.

16th. Because the Court erred in defining voluntary manslaughter. *Record*, 209.

17th. Because the Court erred in telling the jury that they could exercise no discretion in the matter. *Printed Record*, 210.

18th. Because the Court erred in its instruction on manslaughter, etc. *Printed Record*, 210.

19th. Because the Court erred in instructing the jury that "the man slain must have made an attack of deadly character on this defendant," etc. *Printed Record*, 210.

20th. Because the Court erred in defining manslaughter, etc. *Printed Record*, 210.

21st. Because the Court erred in instructing the jury that if defendant killed Gentry even when in deadly danger he would still be guilty of manslaughter.

22nd. In instructing the jury that they might disbelieve any and all evidence produced by defendant.

23rd. In saying to the jury that they might believe the evidence of the government, etc. *Printed Record*, 211.

24th. In telling the jury the credit they might attach to defendant's statements.

25th. Because the Court erred in instructing the jury on the question of flight. *Printed Record*, 212.

26th. In instructing on flight. *Printed Record*, 212.

27th. Because the Court erred in instructing the jury as to the weight to be given to evidence of flight. *Printed Record*, 213.

28th. In instructing as to the weight to be given to evidence of flight. *Printed Rec.*, 213.

29th. In instructions on character.

30th. In instructing on reasonable doubt.

31st. In instructing on reasonable doubt.

32nd. Because the instructions are argumentative and aid the Government's case unfairly by showing bias of the Court in favor of conviction.

33rd. Because the instructions of the Court are confusingly lengthy.

34th. Because the testimony shows that deceased and defendant were both Indians and the Court had no jurisdiction.

BRIEF AND ARGUMENT.

We will take up the 1st and 34th Assignments of Error.

It is admitted that plaintiff in error is an Indian and a citizen of the Cherokee Nation.

That being the case it devolved upon the Government to prove the averment beyond a reasonable doubt in the indictment that James Gentry was a white man and not an Indian. That he was not a citizen of the Cherokee Nation, either by blood or adoption.

This was a point so essential to be made out by the Government that unless it could produce this proof the prosecution would necessarily fall for the want of jurisdiction. It is a jurisdictional fact that must be substantiated by the government before it can proceed to try the plaintiff in error, an admitted citi-

zen of the Cherokee Nation, for the alleged crime of murdering Gentry in the Indian country.

The courts of the United States have no jurisdiction where one Cherokee commits a crime upon or against another.

By the treaty of 1835 between the United States and the Cherokee Nation, exclusive jurisdiction over all crimes committed by one of its citizens against the person or property of another was secured to said Nation.

This was reaffirmed in the Treaty of 1866, (*See* 14 *U. S. Statutes*, *p.* 679), and recognised by Act of Congress, Sec. 2146 Revised Statutes 1878 of United States.

The policy of Congress is to vest in the Courts of the Indian Nation jurisdiction of all controversies between Indians, or where a member of the Nation is the only party.

Ex-Parte Mayfield, 141 *U. S.*, 107-116.

We maintain that so far from proving this question to the satisfaction of the jury beyond a reasonable doubt, as by law is required, the Government wholly failed to bring forward any proof to establish this all important and vital allegation of the indictment. Every witness whom the prosecution places upon the stand who testifies upon this question, including Frank Vore, George Vann, J. H. Vestal, J. W. Rice, Irving Vore and Millard Filmore, says that Gentry claimed to be a Cherokee Indian; and that he had the complexion, the dark hair and eyes and the appearance of such; while not a single witness at any stage of the case testified that Gentry was a white

man, that he looked like a white man, or that any time or place or under any circumstances he ever claimed to be a white man, or other than an Indian and a citizen of the Cherokee Nation.

The only facts furnished by the prosecution that touched upon this question were; first, that Gentry had not been allowed to vote at an election held just prior to his death in the Canadian District of the Cherokee Nation. The Government witnesses testified that to entitle a man to vote at this election he must not only be a citizen of the Cherokee Nation, but must have resided in the particular district where he offers to vote six months prior thereto. With the exception of Millard Filmore none of the witnesses for the Government knew why Gentry was not allowed to vote, and had the matter rested here this testimony could have had little if any evidential force, but when the Government placed upon the stand one of the Judges who presided at that election, Millard Filmore, he removed every doubt that might have existed as to the reason why Gentry was refused a vote.

He says they did not question Gentry's claim that he was an Indian, but that they refused to let him vote because he had not resided in that district for the period (six months) required by law. *See Filmore's Testimony, Printed Record*, 64.

The other fact brought forward by the Government on this point is found in the testimony of J. W. Rice.

Rice testifies that he met and became acquainted with Gentry at a mill in the Choctaw Nation the Fall before he was killed, and that Gentry told him he had lived in Southern Ar-

kansas and had a stepmother there, but had no relative. *See Testimony of J. W. Rice, Printed Record*, 38.

This is the sum total of the proof brought forward by the prosecution to establish this vitally necessary allegation.

Rice could not say whether Gentry had lived in Southern Arkansas a day, a month or a year; whether he was born and raised there or whether he was merely there on a visit; but he did say that Gentry told him he a was a Cherokee citizen.

This bare statement of Gentry's to Rice that he had lived in Southern Arkansas is every particle of testimony offered by the Government to show that Gentry was a white man and not an Indian.

Standing alone as it is, does it furnish a scintilla of evidence to prove this issue?

Does the bare fact that Gentry said he had lived in Southern Arkansas, without any statement or proof showing how he came to live there, under what circumstances, or how long he lived there, constitute any evidence of his being a white man; or, that being an Indian he had severed his tribal relations and become a citizen of the United States?

In the case of Elk v. Wilkins, 112 U. S., pp. 94-123, Mr. Justice Gray, delivering the opinion of the court, said: "The alien and dependent condition of the members of the Indian Tribes could not be put off by their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe,

or such members of it as chose, to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to beceme citizens on application to a Court of the United States for naturalization and producing satisfactory proof of fitness for civilized life."

Chief Justice Taney in his opinion in Scott v. Sanderson, 19 How., 393-404, did not affirm or imply that either the Indian tribes, or individual members of those tribes had the right beyond other foreigners to become citizens of their own will, without being naturalized by the United States: His words were: "They, the Indian tribes may without doubt like the subjects of of any foreign Government be naturalized by the authority of Congress and become citizens of a State and the United States. And if an individual should leave his Nation or tribe and take up his abode among the white population he would be entitled to all the rights and privileges which would belong to emigrants from any other foreign country." But as was said by Mr. Justice Gray in the case of Elk v. Wilkins, just cited: "An emigrant from any foreign State cannot become a citizen of the United States without a formal renunciation of his old allegiance, and on acceptance of that renunciation by the United States through such form of naturalication as may be required by law."

He further says in this same case: "Indians born within the Territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes, an alien through dependent power, although in a geographical sense,

born in the United States and subject to the jurisdiction thereof, are no more citizens thereof within the meaning of the 1st section of the 14th amendment to the Constitution of the United States, than are the children born in the United States of Embassadors, or other public ministers of foreign Nations."

In the case of United States v. Osborne, 6 Sawy., 406-409, Judge Deady said: "But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the Government. The fact that he has abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States, but does not of itself make him one."

If James Gentry was a Cherokee Indian, (and every word of testimony in this case is to that effect) his merely having lived in a State bordering the Indian Country would not have the effect of changing him into a white man—of making him a citizen of the United States, so that when he returned to the Indian Country he would no longer be an Indian.

It is respectfully submitted that there is no evidence upon which to predicate the verdict of the jury finding that James Gentry was a white man and not an Indian. That it was therefore clearly the duty of the Court at the close of the testimony in this case to have instructed the jury that the jurisdictional fact that Gentry was a white man and not an Indian had not been established by the Government and that they should so return the verdict.

This instruction should have been given even under the old law which held that if there was a scintilla of evidence to support the issue the Judge was bound to leave it to the jury. Then how much more imperative it was under the modern rule which has established the doctrine that before the evidence is left to the jury there is, or may be, in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Commissioners v. Clark, 94 *U, S.* 278-288.
Marshall v. Hubbard, 117, *U. S.* 415-419.

We further claim that the instructions of the Court covered by the first Assignments of Error are argumentative, are based upon facts not proven in the case and deal unfairly with plaintiff in error in not directing the attention of the jury to that part of the evidence favorable to his defense.

That there was great and manifest error in that part of the charge to the jury in which the Court said: "If the Government shows a state of case where there has been no recognition, if the Government shows a state of case where a man as far as the evidence shows has constantanly lived out of that country and come into it at a late period, you have a right to take these facts into consideration as establishing a state of case that would prove the proposition sufficiently until it is overthrown by evidence establishing a state of case that is different from the alle-

gation contained in the indictment. You have a right, and it is your duty to take into consideration upon this proposition, all the facts and circumstances. The fact that if he was related there, his relatives took no interest in him when killed, that if he was connected by the tie of blood with that people that that was manifested or made known at the time of the killing, or since that time, and all these usual, and probable and natural circumstances that would exist if the proposition is true that he was an Indian and that would surround him as a member of that Nation." *See Printed Record, p.* 159.

This was error because there was no evidence that Gentry had not been recognized by the Cherokee Nation. There is no evidence that he had constantly lived out of that country and only come into it at a late period. There is no evidence that his relations knew of his being killed and took no interest in the matter, and there is no evidence that the Cherokee Nation consists only of Webber's Falls and its immediate vicinity. On the contrary, it is a fact of which the Courts take judicial notice that the Cherokee Nation is a country of great extent, larger than many of the States of the Union, with but limited means of communication among its scattered population at the date of the killing of Gentry.

Instructions given a jury upon a purely hypothetical case, or involving abstract propositions, unsupported by any evidence cannot be sustained.

Bryan v. United States, 66 *U. S.* 140.
Beaver v. Taylor, 1 *Wall*, 637.

Chicago v. Robbins, 2 *Black*, 298.

The next Assignments of Error to which we desire to call special attention, are the 9th, 10th and 11th:

In instructing the jury upon the law of self-defense, the Court used this language: "In this case, under this proposition, at the time he shot Gentry, the life of Famous Smith, the defendant, must have been in deadly peril, or he must have been in danger of receiving enormous bodly harm, which must have sprung from the actions of the party at that time, or, in other words, Gentry must have made such an attack upon him as indicated from the way it was made, or from the character of that attack, that he intended then and there to take away the life of defendant, or to inflict upon him some enormous bodily harm. And what is meant by that? Not a mere break of the skin, but harm that might produce death when that harm was inflicted on the body." *Printed Record*, *p*. 172.

The Court's language to the jury in this instruction ignores all evidence of threats made by Gentry against defendant and which were communicated to him before the killing.

The jury is virtually told by this instruction that the defendant, in judging of the intentions of Gentry in making the attack upon him, is restricted and confined to the actions and conduct of Gentry at the time he made the attack. That the only source from which he can draw conclusions as to what Gentry's intentions were when he made the attack, that is to say whether Gentry's intentions were to kill him or not, are solely and exclusively from the actions and conduct of Gentry at the time

of making it. We respectfully submit that this is not the law in a case like this, where the evidence shows recent threats of deceased against defendant, and which had been communicated to him before the difficulty. If threats had been made by Gentry against the life of defendant a short time before the killing, and these threats had been communicated to defendant prior to that time, did he not have a right to take them into consideration together with the acts of Gentry at the time of the attack in determining whether or not he was about to be killed, or to receive great bodily harm?

Evidence of communicated threats is admissable to shed light upon the mental attitude of the prisoner toward the deceased when the homicide occurred.

Wood v. State, 92 *Ind.*, 269.
State v. Evans, 33 *W. Va.*, 417.

Even uncommunicated threats are admissable to show what deceased's attitude was at the time of the fatal collision.

In the case of Wiggins v. People. 93, U. S., 465, Mr. Justice Miller, in giving the opinion, said: "Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide where the threats had not been communicated to him there is a modification of the doctrine in more recent times established by the decisions of the courts of high authority, which is very well stated by Wharton in his work on criminal law, sec. 1027: "Where the question as to what was deceased's attitude at the time of

the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, though such threats were not communicated to the defendant. The evidence is not relevant to show the *quo animo* of the defendant, but may be relevant to show that at the time of the meeting deceased was seeking defendant's life."

The Court also says in its instruction on self-defense: "I Gentry attacked this defendant in such a way as to indicate from the nature of that attack a deadly purpose upon his part, or a purpose to do enormous bodily harm, and was then and there engaged in executing that purpose and there was no way of avoiding it, by retreating when he was on horseback, or by avoiding the consequences by the exercise of less violence than by shooting him to death, and he repeatedly shot at him when he could have crippled his horse. If that was the state of case and he could have saved his own life by the exercise of less violence than deadly violence, he is required to do that under this law."

We affirm that this instruction is not the law. That the Honorable Court erred when he sought to convey the impression to the jury that, although, Gentry might have been making a murderous assault upon defendant, yet, still it would have been the duty of defendant to have retreated.

Mr. Bishop, in his work on criminal law, (*See 1st Vol. Sec.* 850), says: "Where an attack is made with murderous intent, the person attacked is under no obligation to fly. He may stand his ground, and if need be, kill his adversary. And it is

the same where the attack is with a deadly weapon, for in this case the person attacked may well assume that the other intends murder, whether he does in fact or not."

Irwin v. State, 29 *Ohio, St.* 186.
State v. Tweedy, 5 *Iowa*, 433.
Runyon v. State, 57 *Ind.* 80.
Burgess v. Territory, 19 *P.* 558.
May v. State (*Tex*). 4 *S. W.* 591.
Marcum v. Commonwealth, (*Ky*). 4 *S. W.* 786.

In this instruction the Court uses the words "enormous bodily harm" instead of "great bodily harm," and repeats the expression in many parts of the instructions.

This we claim was misleading and erroneous.

In the case of McDonald v. State, decided by the Supreme Court of Tennessee, (*See* 14 *S. W.* 487), Turney, C. J., in speaking of the use of these words, said: "It is insisted by the Attorney General that the phrase "great, or enormous bodily harm" is not erroneous, that the words are synonymous, or nearly so. To be nearly synonymous is not sufficient. To satisfy the law there must be complete synonomy. Especially must this be so after the use of "great" in our Courts for a period of sixty years without addition or qualification. To say that words are nearly synonymous is to admit a difference in their grades of meaning. We must also look to the meaning as commonly understood by the community and as naturally interpreted by juries. By this rule it is readily seen that the word "en-

ormous" has more intensity and deeper color of expression than the word "great." Courts and juries are accustomed to the one and not to the other in the investigation of homicides. Their education must be regarded. * * * When the path is plain and well known by long and constant travel, it is always safe to pursue it; while it is always dangerous to undertake to make a new one to the same end, or to qualify old, unbroken and well understood expressions of what the law is."

Passing over several Assignments of Error which, although, we believe, to be well taken we will not discuss, we next take up the 25th, 26th, 27th and 28th.

The Court in these instructions gives undue prominence to the evidence tending to show avoidance of arrest by plaintiff in error. They place defendant in the most unfavorable light before the jury, that specious reasoning could produce, and they fail to caution the jury as to the weight that they should attach to this kind of evidence.

The testimony shows that plaintiff in error remained around his house for some time after killing Gentry. That he then went to Texas and staid several months; that he returned home, staid awhile and went to Southern California for the benefit of his health, which had begun to fail; that he returned from California in 1885, and since that time he has remained at his home, conducting his farming and stock business, managing a gin during a portion of the time, appearing at the public gatherings of the neighborhood, frequently visiting Webber's Falls, and on two occasions coming to Fort Smith on business, and generally

conducting himself as a law-abiding citizen, making no concealment of his presence.

The instructions of the Court on the question of flight were calculated to give the jury an exaggerated opinion of the importance of the evidence tending to show it, and of the weight they should give it in passing upon the guilt of the accused. Every point tending to strengthen the theory that defendant fled from justice because he knew he was guilty, is carefully laid before the jury; while facts that were favorable to him on this question are quietly and silently ignored.

The fact that the evidence showed that he was only out of the country a short time; that after his return until the day of his arrest, a period of more than seven continuous years, he remained at and about his home attending his business of farming, ginning and stock raising, visiting his neighbors, present at the public gatherings, making no concealment of his presence in any way, associating with the officers of the law and on two occasions when visiting Fort Smith, going into the very stronghold of the law itself; certainly does not indicate that character of flight, or fleeing from justice which furnishes a presumption of guilt. Then again the process he was evading, and he does not deny that when he suspicioned a marshal was coming to arrest him he went out the back door into his field until the danger was passed, was not the process issuing from the Courts of his native country. The trial he was avoiding was not a trial by the laws with which he was familiar, nor by a jury of his countrymen. But an arrest on the charge of murder, upon a

warrant issuing out of the Court of the United States, which meant to him being dragged away from his home and his people, carried into a strange country, arraigned and tried in a strange and foreign Court by strangers and foreigners, and under strange and to him unknown laws, and if at last, able to satisfy them of his innocence, the certainty that before that could be done, he would be compelled to pass weeks, perhaps months within the walls of the prison.

Is it not reasonable that an avoidance of arrest under these circumstances could be and was entirely consistent with innocence? Yet the Honorable Court mentions none of these things to the jury in its instructions. It does not even tell them that flight is not conclusive evidence of guilt, but is merely a circumstance to be considered by them and given such a weight as in the light of all the facts and surroundings they think it may be entitled.

There can be little doubt that the verdict of the jury finding that Gentry was a white man and not an Indian was brought about by the instructions of the Court on flight. There is just as little doubt that the verdict of the jury finding plaintiff in error guilty of murder was to a large extent brought about by the instructions on flight.

Believing that the errors already argued are more than sufficient to require a reversal of the judgment in this case, we forbear discussing the many other errors with which this record abounds.

A. H. GARLAND,
Attorney for Plaintiff in Error.

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A. H. GARLAND,
Attorney for Plaintiff in Error.

CASE No. 15387.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

FAMOUS SMITH, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 1003.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error was convicted for the murder of one James Gentry, in the Canadian district, near Webbers Falls, Cherokee Nation, Indian Territory, in August, 1883. The trial having been so long deferred the Government witnesses were unable to fix the exact date. It was made August 1 in the indictment, but defendant put it at August 9. The case was tried before Judge Parker, at the May term, 1893, and the prisoner sentenced to death August 5, 1893.

Thirty-four assignments of error are contained in the record. One of these, the thirty-fourth, raises a jurisdictional question. This question does not arise upon any exception or upon any paper in the record outside of the bill of exceptions. Plaintiff in error asks the court to find as a fact from the testimony in the bill of exceptions that the murdered man was an Indian; to find also that he himself is an Indian; and upon these findings to dismiss the case for lack of jurisdiction. In connection with this assignment the question will arise, whether under the decision *In re Mayfield*, 141 U. S., 107, the court has jurisdiction to try a Cherokee Indian for murder committed within the Cherokee Nation, whether the murdered man be an Indian or not.

Most of the other assignments of error (which are not jurisdictional) are not founded upon any exception taken at the trial. They will, therefore, not be argued by us, since no objection is available unless exception was taken at the time of the adverse ruling. (*United States* v. *Breitling*, 20 How., 252, 254; *Poole* v. *Fleeger*, 11 Pet., 185, 212; *Walton* v. *United States*, 9 Wheat., 651; *Scott* v. *Lloyd*, 9 Pet., 418, 442; *Hutchins* v. *King*, 1 Wall., 53, 60; *Stanton* v. *Embrey*, 93 U. S., 548, 555; *Alexander* v. *United States*, 138 U. S., 353, 355.)

The remaining assignments of error relate entirely to exceptions to the charge, and will hereafter be considered.

The questions raised relating to the jurisdiction of the court over the Cherokee Nation are of great importance in other cases, and it would seem that this jurisdiction and the rules of evidence relating thereto should be clearly settled and defined.

STATEMENT OF FACTS.

It is undisputed that Gentry was killed by Famous Smith on or about the day mentioned. Famous went on the stand and gave his account of the occurrence, which will be found in the printed record at pages 76, 78, and 87–92. He says that they were both on horseback, riding together; that he stopped and proposed to ride back; that Gentry rode at him with a pocketknife; that he himself drew a pistol and shot his assailant. Some of the witnesses testified that Famous's account of the incident at the time was that the attack was made by Gentry, not with a knife, but with a quirt (pp. 21, 50, 69).

The testimony as to the race and nationality of the parties was as follows:

Famous Smith, according to the Government's first witness, was "said to be" an Indian. He was admitted to be a resident of the Canadian district (p. 7). He was admittedly recognized as a Cherokee citizen. He was born and raised in the Cherokee Nation, and always considered a Cherokee there. Witness guessed that he was in fact a Cherokee (p. 15). Famous himself testified that he was an Indian, part Creek and part Cherokee in blood, and a citizen of the Cherokee Nation (p. 73). There is no evidence to the contrary, and the court admitted in its charge that Famous was an Indian (p. 158), and impliedly that he was a Cherokee citizen.

The testimony as to Gentry's race and citizenship was less clear.

George Vann, a witness for the Government, defendant's brother-in-law and neighbor, testified that Gentry claimed to be a Cherokee Indian, and looked like an Indian in color and hair (pp. 14, 15); that he claimed kin with the Vanns and Drews. Witness, however, did not believe that he was recognized "up there" as an Indian (p. 17).

Frank Vore, a witness for the Government, a Cherokee, living at Webbers Falls, testified that Gentry looked like an Indian to him and claimed to be a Cherokee Indian. Witness was clerk at an election when Gentry came in to vote, and the judge would not let him vote. Witness did not "know whether it was because he had not been there six months or had not been admitted" (pp. 25–26). The people in general recognized him as an Indian. The witness did not know whether the law would recognize him as such. Witness supposed that he had not been admitted to citizenship, but could not say for certain what reason the judge gave for not recognizing him as an Indian. (p. 29).

J. H. Vestal, a witness for the Government, residing in the Canadian district, Cherokee Nation, a Cherokee by nationality, not by blood, testified that Gentry told him he was an Indian; did not say of what tribe; said he was going to vote, so that the "presumption with me was that he was a Cherokee." Witness could not say whether Gentry was recognized as a citizen by the people in that country (pp. 37, 38).

J. W. Rice, witness for the Government, a white man long resident in the Cherokee country, said Gentry told him

that he was from southern Arkansas. He always claimed to be an Indian, but witness did not know whether he had been recognized "up there" or not. He said he had a stepmother living in southern Arkansas, but did not say where he had been raised himself. Said that he had lived in the southern part of Arkansas. Said that he was a Cherokee Indian. Said that he had no relatives in the southern part of Arkansas at all (pp. 38–41).

Irvin Vore, witness for the Government, a Cherokee living at Webbers Falls, said that he heard Gentry claimed to be an Indian; Gentry never said so to him. He heard that the authorities "up there" did not recognize him as an Indian (p. 48).

R. E. Blackstone, witness for the Government, a Cherokee merchant at Webbers Falls, could not say whether Gentry was an Indian or a white man; did not know that he ever exercised any rights of citizenship there; said that the authorities did not recognize him as a citizen there. Being asked for an instance, said that on one occasion he wanted to vote there, and was not allowed to, as witness had heard. It was at the general election (pp. 61, 63). This election was held on the first Monday in August (Compiled Laws Cherokee Nation, Chap. VIII, Art. I, §. 1, ed. 1881), which in 1883 fell on August 6. He was killed three days later (p. 75).

Millard Fillmore, a witness for the Government, who guessed that he was a Cherokee himself, testified that he was one of the judges at that election; that Blackstone, the other judge, told Gentry he had not been in the district long enough to vote. Gentry said he was satisfied he was an Indian, and walked out. There was no argu-

ment about that at all hardly. Witness admitted that he claimed to have forgotten the reasons for refusal a few days before when questioned by the Assistant District Attorney, but said that on thinking it over this memory was refreshed (p. 64).

Famous Smith, on his own behalf, testified that Gentry told him he was a Cherokee Indian (p. 83).

Robert Lackey, witness for defendant, formerly resident at Webbers Falls, testified that Gentry always claimed to him that he was a Cherokee. Witness did not know that Gentry had ever exercised any rights as a Cherokee citizen (pp. 107, 108).

Edward Smith, first cousin of defendant and witness on his behalf, testified that Gentry claimed to be an Indian. Witness could not state whether he was one or not (p. 113).

Louis Crapo, a resident of Illinois Station, formerly resident at Webbers Falls, testified on behalf of defendant that Gentry "looked kind of dark like some kind of a tribe;" he might have been a Creek or a Cherokee (p. 123).

Richard Scott, an Indian formerly residing at Webbers Falls, witness for defendant, testified that Gentry told him he had been living in the Choctaw Nation, but claimed to be a Cherokee Indian and looked like one, and witness always supposed him to be one. "Everybody seemed to think that he was an Indian; nobody didn't dispute it at all, and had no reason to, I reckon." (P. 128.)

Timothy Fields, witness for defendant, a Cherokee Indian, formerly residing at the other end of the Canadian

district, near Fishertown, in the Creek Nation, and about 1½ miles from the Creek line, testified that he formerly had a neighbor named Kajo Gentry, whom he last saw in the spring of 1858. Kajo was a married man with two children, a Cherokee, nephew of old John Drew, a Cherokee Indian. Kajo was killed by the Creeks near Fishertown. Witness knew nothing further of the family (pp. 134, 136). Kajo was killed in the spring of 1858.

Richard Crosslin, a Cherokee Indian, witness for defendant, testified that he knew Kajo Gentry about 1856–'57, at Webbers Falls. Kajo was considered an Indian, and reputed to be a nephew of old John Drew. Kajo lived 25 miles from witness (p. 136).

Dr. W. W. Campbell, witness for defendant, a Cherokee citizen, resident at Illinois Station, about a mile from Webbers Falls, testified that he knew Kajo Gentry as a boy, when Kajo was reputed to be an Indian (pp. 137, 138).

Edmond Fleetwood, witness for defendant, a Cherokee, testified that he knew Kajo Gentry; that he was of Creek or Cherokee blood; that he first saw James Gentry when he was small, at Kajo's; that he was a son of Kajo; that he saw him again at witness's house in the Delaware district "about the time we had the first payment. We got about $10.40," about 1871 or 1872. That James Gentry worked for him sometime, being then 15 or 18 years old, and said that he was a Cherokee and Creek mixed, and a son of Kajo Gentry; that James got witness to represent him at the enrollment and get his name enrolled, and told witness that he got his money at Vinita.

"It was a payment to the Cherokee citizens of the Cherokee Nation; each citizen, red, white, and black, drew what was known as bread money." Gentry was afterwards at witness's house in the Sequoyah district, not long before he was killed. He and witness went over into the Choctaw country and attended a picnic there together. Gentry always claimed to be a Cherokee and the son of Kajo Gentry. "That is what he told me; he always passed for that; never claimed anything else but that. * * * He looked like an Indian. He was dark complected; showed to be a quadroon Indian to look at him" (pp. 140–142).

On cross-examination Fleetwood stated that he knew Kajo Gentry both in the Canadian and up in the Cooweescoowee district, where witness was born and Kajo had an aunt living. Witness believed Kajo had lived in all parts of the nation like himself; that he married an Indian woman; that when he first saw James Gentry in the Delaware district "he said he was one of the old man's boys." That this was "the first time that I seen him to know exactly who he was." That there were several families all connected, but none of the Gentry name except him. That witness represented Gentry at the payment and got the collector to put his name down. That Gentry "told me that he had trouble about voting; they objected to his voting because he had not been in the district long enough" (pp. 142, 143).

Mrs. Robert Vann, witness for defendant, a Cherokee woman, testified that Gentry claimed to be a Cherokee Indian, was "tolerable dark and black hair (p. 147).

Robert Vann, witness for defendant, husband of the last witness, living about 10 miles from Webbers Falls, on the Canadian River, testified that James Gentry said he was a Cherokee and claimed that Kajo Gentry was his father (pp. 147, 148).

J. W. Speck, a white man, witness for defendant, formerly living near Webbers Falls, testified that Gentry claimed to be a Cherokee Indian, and "looked sorter like a quadroon, something like that." He claimed to be a cousin of Jane Hays, an Indian living in that neighborhood (p. 151).

Rese Helterbrand, witness for defendant, a resident of the Cherokee Nation, testified that Gentry claimed to be an Indian citizen; that he "always claimed that he came from the Choctaw Nation is all the further I could trace him from." That he claimed to be a citizen, but witness never heard him claim to be a Cherokee (pp. 152–154).

Gentry's alleged enrollment as a Cherokee was not produced. On the contrary, the prisoner, who had been a Cherokee deputy sheriff, admitted that if Gentry were a Cherokee, he himself, being a Cherokee, would be tried by the Cherokee authorities for the murder, but that "they would not have anything to do with it up there" (p. 84).

JURISDICTION.

We will first notice the thirty-fourth assignment of error, relating to the jurisdiction of the court.

(A) Upon the jurisdictional objection the first question before the court is whether the point is properly raised.

We do not understand that there is any difference between civil and criminal cases as to the necessity of presenting questions properly to this court, or as to the mode in which they should be presented, except where there may be some specific statutory provision relating to one or the other class of cases. It was, indeed, provided by the act originally conferring criminal jurisdiction upon this court that the final judgment of the circuit court "shall, upon the application of the respondent, be reëxamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error under such rules and regulations as said court may prescribe." (Act of February 6, 1889, chap. 113, § 6.) Primarily the statutory authorization to review upon "writ of error" implies all the restrictions or limitations of the ancient practice with relation to these writs. If the authority to prescribe rules and regulations authorizes the establishment of a more liberal practice nothing in this direction has yet been done by this court. Its decisions since it received general criminal jurisdiction seem to recognize that it exercises no wider jurisdiction than is given by the ancient practice with relation to writs of error (*Alexander* v. *United States*, 138 U. S., 353, 355; *Moore* v. *United States*, 150 U. S., and *Holder* v. *United States*, 150 U. S., decided October 30, 1893), although it would seem from *Hicks* v. *United States*, decided November 27, 1893, that the rules are more liberally construed in capital cases *in favorem vitæ*.

Upon jurisdictional questions such limitations are often only a formal matter, as the prisoner, if he has failed to take exceptions upon which a writ of error can be based,

may raise the question by writ of *habeas corpus*. (*In re Mayfield*, 141 U. S., 107.) But even jurisdictional questions can not thus be raised in such a way as to contradict the record. (*Id.*, p. 116.) It would contradict the record in this case if the prisoner were to obtain a writ of *habeas corpus* on the ground that Gentry was an Indian. If, therefore, the question can not be raised upon this writ it would seem that the prisoner has no further remedy in that regard.

(B) Can the jurisdictional question be now raised, not having been raised at the trial?

It was conceded at the trial that the evidence was conflicting. It was conceded that Gentry's citizenship was a question of fact for the jury to decide. The only objections raised by the prisoner's counsel in this regard were objections to remarks of the court in submitting the evidence to the jury. Can this court decide that evidence was not conflicting which was admitted at the trial to be conflicting? Can the court in any case, without special statutory authority, and without any exception raising the point, make for itself a finding of fact upon parol testimony incorporate, in the bill of exceptions, and then give this finding of fact the same force as if it were a recital in the pleadings or judgment?

It is familiar law that in civil cases jurisdictional objections may be taken by the court itself, though not suggested by the parties, upon any information that it may obtain from the record, whether by parol evidence or otherwise. This, however, results from statutory provi-

sions applicable only to civil cases, and before these provisions were enacted the law upon the point was regarded as uncertain.

The provisions referred to are contained in the act of March 3, 1875, chapter 137, § 5, whereby it was enacted:

> That if, in any suit commenced in a circuit court * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, * * * and shall make such order as to costs as shall be just.

The prior condition of the law, before the question had been settled by this statute, is described by Chief Justice Waite in *Williams* v. *Nottawa* (104 U. S. 209, 211), as follows:

> Under the act of 1789 it was held in *Smith* v. *Kernochan* (7 How., 198) that this objection was one which could only be taken by plea in abatement; but in *Barney* v. *Baltimore* (6 Wall., 280) there was no such plea, and the bill was dismissed in this court without prejudice, because it appeared in evidence that certain conveyances, by means of which the citizenship of the parties was changed so as to give the courts of the United States jurisdiction, did not transfer the real interest of the grantors. But whatever may have been the practice in this particular

> under the act of 1789 there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney* v. *Baltimore* (*supra*), such transfers for such purposes are frauds upon the court, and nothing more.

For criminal cases there is no such statute, and the law is therefore the same that it was in civil cases before the statute was passed. It is necessary to resolve the doubt indicated by the learned Chief Justice in the opinion just cited, for if the objection is waived for the purposes of the suit if not taken by plea, *a fortiori* it is waived if not taken at the trial. Nor in criminal cases does the reason exist which caused Congress to put this weapon into the hand of the court. Criminal prosecutions are brought by the Government itself, and there is no danger of fraud or collusion to confer apparent jurisdiction.

Except as to jurisdictional objections there seems to be no doubt that the court upon a writ of error can look into the bill of exceptions only to decide questions which are raised by a specific exception. The only points that can be raised here without an exception are errors or defects in the other portions of the record: that is, matters not resting in parol, such as those discussed in *Slacum* v. *Pomery*,

6 Cranch, 221, 225; *Garland* v. *Davis*, 4 How., 131; *Bennett* v. *Butterworth*, 11 How., 669; *Suydam* v. *Williamson*, 20 How., 427, 433; *Rogers* v. *Burlington*, 3 Wall., 654, 661; *New Orleans R. R. Co.* v. *Morgan*, 10 Wall., 256, 260; *Insurance Co.* v. *Piaggio*, 16 Wall., 378, 386; *Clinton* v. *Missouri Pacific R. R. Co.*, 122 U. S. 469, 474; *Moline Plow Co.* v. *Webb*, 141 U. S., 616, 623. A bill of exceptions, as we understand the practice, is intended only to present the testimony bearing upon specific exceptions taken, and can not be turned into a statement of facts for any other purpose. In *Pomeroy's Lessee* v. *Bank of Indiana* (1 Wall., 592, 602) Mr. Justice Clifford said:

> Suggestion was also made at the argument, that if the paper was not available to the plaintiff, as a bill of exceptions still the evidence, as reported, might subserve his purpose as an agreed statement of facts; but we think not for several reasons. * * * *Thirdly*, because if both of the preceding objections were obviated, still it would not be competent to revise the rulings of the court below in that mode.

In *Hanna* v. *Maas* (122 U. S., 24, 26) Mr. Justice Gray said:

> "The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing," etc. (But see *Bassett* v. *United States*, 137 U. S., 496, 501; *East Tennessee, etc., R. R.* v. *Southern Telegraph Co.*, 125 U. S., 695.)

(C) We understand from the action of the court in *Holder* v. *United States*, 150 U. S., —— (decided October 30, 1893), where exceptions were considered and discussed by the court which were not assigned for error by the prisoner's counsel, either in the assignment of errors or in the brief, that the court desires all possible errors in the record to be brought to its attention, whether suggested by the prisoner's counsel or not.

Plaintiff in error here assigns for error that the murderer and murdered man were both Indians, wherefore the court was without jurisdiction under section 2146 of the Revised Statutes. It may, however, be suggested that under the case of *Ex parte Mayfield* (141 U. S., 107), the United States court may be without jurisdiction in a criminal prosecution in any case where the accused party is an Indian of the Cherokee tribe. In that case, after quoting the portions of the Cherokee treaty hereinafter set forth, and saying that where there is no prosecutor of record there is but one party to a criminal prosecution, this court say, speaking by Mr. Justice Brown:

> We see no reason to doubt that this is a criminal case arising within the Cherokee Nation, in which an adopted member of the nation is the only party; and that it also falls within the other clause of the section, as a case where the cause of action has arisen in the Cherokee Nation (p. 114).

It would appear by the admissions of the defendant, who had been a deputy sheriff of the Cherokee Nation (Record, p. 84), that that nation did not claim to exercise jurisdiction over a murder case when the murdered man was not a member. It seems difficult to derive any other

conclusion, however, from *Ex parte Mayfield* than that not only is a Cherokee citizen without the jurisdiction of Judge Parker's court as to crimes committed in his native country, but that the exemption from jurisdiction is not a mere privilege which can be waived by the defendant. In the Mayfield case the trial was had without any assertion of privilege and the question was brought up on *habeas corpus* after judgment and sentence.

The circuit court for the western district of Arkansas seems to have been exercising jurisdiction in these cases in reliance on *United States* v. *Rogers* (4 How., 567) and other cases contained in Hempstead's reports for that circuit, holding that Indians were exempt from trial in that court only in case of crimes committed by one Indian against the person or property of another Indian.

These cases in Hempstead, however (including *United States* v. *Rogers*, which is there also reported), are based upon the statute of June 30, 1834, chapter 161, entitled "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers." Section 24 of that act contains the germ of the later so-called Indian Territory by annexing to the Territory of Arkansas for certain purposes the Indian country, "bounded north by the north line of the lands assigned the Osage tribe of Indians, produced east to the State of Missouri; west by the Mexican possessions; south by Red River, and east by the west line of the Territory of Arkansas and the State of Missouri." Section 25 of the act is as follows:

> *And be it further enacted*, That so much of the laws of the United States as provide for the punishment of crimes committed within any place within

> the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Section 20 of this act contains special provisions with relation to the trade in spirituous liquors in the Indian country.

The act of June 17, 1844, chapter 103, transferred this jurisdiction to the courts of the United States in and for the district of Arkansas, annexing the Indian country to the State of Arkansas for the same purposes for which it had previously been annexed to the Territory. The act of March 3, 1851, chapter 24, divided the district of Arkansas into two judicial districts and transferred the Indian country to the western district. The act of March 27, 1854, chapter 26, § 3, seems to have been intended to establish an exception to the jurisdiction of this court, "in any case where, by treaty stipulations, the exclusive jurisdiction over such offenses may now or hereafter be secured to said Indian tribes respectively." It may be doubted, however, whether the section attained its object, as the words just quoted are made applicable only to the twentieth, not to the twenty-fifth, section of the act of 1834.

Portions of the acts of 1834 and 1854 are embraced in sections of the Revised Statutes. Section 5596 of the Revised Statutes provides that—

> All acts of Congress passed prior to said 1st day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed,

> and the section applicable thereto shall be in force in lieu thereof: * * * *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from any act containing other provisions of a private, local, or temporary character, shall not repeal or in any way affect any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force.

The Revised Statutes, therefore, have repealed all general provisions in the earlier statutes bearing upon the jurisdiction of the Arkansas court over the Indian country; a fact necessarily implied in the Mayfield decision above cited.

(D.) The present criminal jurisdiction over the Cherokee country exercised by Judge Parker's court is defined by certain treaties and statutes, whose substance can be summed up as follows: *First*. This court was entrusted in 1883 with all Federal jurisdiction over the northeasterly portion of the so-called Indian Territory; *second*, this included a general jurisdiction over homicide cases, except where the victim was an Indian, or where the culprit had been punished by the local law of the tribe, or where exclusive jurisdiction was granted to any Indian tribe by treaty; *third*, the Cherokee Nation then had, (with a single exception,) exclusive jurisdiction over all criminal prosecutions where the sole parties were Cherokees, and over all causes of action arising in the Cherokee Nation; *fourth*, that jurisdiction has now been cut down by statute, so as to exclude causes of action arising

in the nation, but so as still to include nearly all prosecutions where the sole parties are Cherokees.

The statutes and treaties bearing on the case are as follows:

(1) As to the territorial jurisdiction of Judge Parker's court.

> Section 533 of the Revised Statutes, as amended by the act of January 31, 1877, chapter 41, provides that: "The State of Arkansas is divided into two districts, which shall be called the eastern and western districts of Arkansas. The western district includes * * * the country lying west of Missouri and Arkansas, known as the Indian Territory."
>
> The act of January 6, 1883, chapter 13, § 2, provides: "That all that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian *not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes*, shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district of Kansas."
>
> Section 3 of the same act provides: "That all that portion of the Indian Territory not annexed to the district of Kansas by this act, and *not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian tribes*, shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district known as the northern district of Texas."
>
> From the latter district the Chickasaw and part of the Choctaw Nation were taken and annexed to the eastern district of Texas by the act of March 1, 1889; chapter 333, § 17. All of these acts, however, leave the Cherokee Nation in the western district of Arkansas so far as not excepted by its own treaty.

(2) As to the general Federal jurisdiction over crimes in Indian countries.

Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country (Rev. Stat., § 2145). The preceding section shall not be construed to extend to *crimes committed by one Indian against the person or property of another Indian*, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, *or to any case where, by treaty stipulations, the exclusive jurisdiction over such offense is or may be secured to the Indian tribes respectively* (§ 2146).

The title referred to is Title XXVIII, "Indians." It does not expressly provide any punishment for murder or manslaughter.

(3) As to the exclusive jurisdiction of the Cherokee courts in 1883.

The Cherokee treaty of July 19, 1866 (14 Stat., 799), Article XIII, provides for the establishment of a court or courts by the United States in the Cherokee Territory, "with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all *civil and criminal cases* arising within their country *in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation*, except as otherwise provided in this treaty."

The exception therein referred to is contained in Article VII, as follows: "The United States court to be created in the Indian Territory; and until such court is created therein, the United States district court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all cases, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case."

The district thus referred to is described in Article IV of the treaty, being "the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River and bounded," etc.

Plaintiff in error is admitted to have been an inhabitant of the Canadian district and the murdered man to have been also temporarily a resident of said district, which is legally bounded and defined as follows: "Beginning at the junction of the Arkansas and Canadian rivers; thence up the Canadian River to the line of the Muscogee Nation; thence along said line to the Arkansas River, and down the same to the place of beginning." (Laws of the Cherokee Nation, ed. 1881, p. 194.) The Muscogee is the same as the Creek Nation.

Ex parte Mayfield (141 U. S., 107) construes Article XIII of this treaty to cover all criminal cases where there is no prosecutor of record (if there can properly be any prosecutor of record in our criminal practice), and relegates all criminal proceedings against Cherokees for crimes committed within the Cherokee Nation to the native courts, disclaiming Federal jurisdiction even in case of offenses not recognized as crimes by the native laws.

Earlier extracts from Cherokee treaties and laws, with examples of their forms of judicial procedure, may be found in the interesting opinion of Judge Caldwell in *Mehlin* v. *Ice*, 56 Fed. Rep., 12.

(4) As to subsequent statutes partially repealing provisions of the Cherokee treaty giving exclusive jurisdiction to the courts of that nation.

> The act of March 3, 1885, chapter 341, § 9, provides: "That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or another person any of the following crimes, namely, murder, manslaughter, * * * within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to such crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases." This provision is inserted for reference. It does not seem to apply, however, to the so-called Indian Territory, which was not in any sense an organized Territory prior to the act of 1889, and is not yet a Territory in the true sense of the word.
>
> The act of June 9, 1888, chapter 382, provides: "That any Indian hereafter committing against the person of any Indian agent or policeman appointed under the laws of the United States, or against any Indian United States deputy marshal, posse comitatus, or guard, while lawfully engaged in the execution of any United States process, or lawfully engaged

in any other duty imposed upon such agent, policeman, deputy marshal, posse comitatus, or guard by the laws of the United States, any of the following crimes, namely, murder, manslaughter, * * * or who shall in any manner obstruct by threats or violence any person who is engaged in the service of the United States in the discharge of any of his duties as agent, policeman, or any other officer aforesaid within the Indian Territory, or who shall hereafter commit either of the crimes aforesaid in said Indian Territory against any person who, at the time of the commission of said crime, or at any time previous thereto, belonged to either of the classes of officials hereinbefore named, shall be subject to the laws of the United States relating to such crimes, and shall be tried by the district court of the United States exercising criminal jurisdiction where such offense was committed," etc.

The next statute in point is the act of March 1, 1889, chapter 333, "To establish a United States court in the Indian Territory, and for other purposes." This act establishes a court with jurisdiction over many crimes, but not over murder, or over manslaughter. Section 6 of this act gives it a general civil jurisdiction except with relation to "controversies between persons of Indian blood only." Section 20 gives jurisdiction to the United States circuit court to try Indians for murder by malicious injury to railroads; but otherwise the prior laws as to jurisdiction in cases of homicide are not disturbed.

The act of May 21, 1890, chapter 182, "To provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," restricts the Indian Territory by section

29, and by the same section extends the jurisdiction of the United States court in the Indian Territory to all civil cases therein, "except cases over which the tribal courts have exclusive jurisdiction." Section 30, after various provisions concerning criminal proceeding in civil suits, provides: "That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising *in the country in which members of the nation by nativity or by adoption shall be the only parties.*"

Section 31 of the same act provides as follows: "The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations shall have the same force and effect in the Indian Territory as elsewhere in the United States; *but nothing in this act shall be so construed as to deprive any courts of the civilized nations* of exclusive jurisdiction over all cases arising *wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties*, nor so as to interfere with the right and power of said civilized nations to punish said members for violations of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

These statutes are inserted in order that a complete view of the present situation in the Cherokee Nation may be had. It is, however, unnecessary to discuss the precise meaning of the provisions in the Oklahoma act, which are long subsequent to the murder of James Gentry, as they were, indeed, subsequent to the crime under consideration. *In re Mayfield supra.*

(E) As above stated, we are unable to construe *In re Mayfield* otherwise than as excluding all Federal jurisdiction in criminal prosecutions where a Cherokee citizen is the defendant, at least when there is no prosecutor of record, and when the crime was committed before the passage of the Oklahoma act. The case seems also to hold that the exemption is not a personal privilege which can be waived. If a criminal case against a Cherokee citizen is brought in the Federal courts it would seem that there must be a prosecutor of record who either is not a Cherokee or whose local relations are such as to bring the case within Article VII of the treaty of 1866.

If the above statements be correct, then this plaintiff in error is entitled to release upon *habeas corpus;* and is entitled also to a reversal upon this writ of error if the record is in such shape as to present the point.

(F) *In re Mayfield* seems also to take away all jurisdiction in case of crimes as well as civil actions, where the proceeding is based on occurrences within the Cherokee country not covered by Article VII of the treaty. Perhaps this point, not having been necessary to the decision of the Mayfield case, will be held not concluded thereby. It seems to be contrary to the understanding of the people in that neighborhood, both the Federal authorities and the Cherokees themselves, and the treaty is superseded to this extent by the Oklahoma act of 1890. The term "cause of action" is commonly used of civil cases only.

(G) If, however, it is necessary to the decision to discuss the *status* of the murdered man, James Gentry, it is

respectfully submitted that the conviction must be affirmed; for to reverse the conviction it will be necessary to show first, that he was an Indian, and second, that he was not a Cherokee belonging to some other than the Canadian district. Section 2146 of the Revised Statutes certainly refers to Indian citizens, not merely to all people having Indian blood; and its general language as to Indians is certainly subject to exception by special treaty provisions such as Article VII of the Cherokee treaty of 1866. (*Ex parte Crow Dog*, 109 U. S., 556, 570).

The evidence is conclusive that he was merely a recent comer in the Canadian district, not recognized as having any of the rights of a citizen of that district; that he had been sojourning there merely for the purpose of serving the defendant, Famous Smith, and that, when shot, he had already gone to work for R. E. Blackstone (pp. 61, 75), who was in Webbers Falls, a village which is shown on all the maps as north of the Arkansas River, and therefore without the boundaries of the district. He was not even an actual sojourner in the district when shot; and the word "inhabitant" in Article VII of the Cherokee treaty clearly required something more than a mere temporary sojourn—something which would involve recognition by the inhabitants of the district.

The evidence contains a clear enough account of the proceedings at the election of August, 1883, a few days before Gentry was killed. These proceedings do not show whether or not he was a Cherokee, a question not then necessary to decide; but they do show conclusively that

he was not regarded as having lived long enough in the Canadian district to be qualified as a voter. Chapter VIII of the Cherokee laws, Article 1, § 2, gives the right of suffrage to "every male citizen of the nation aged 18 years, who shall have been a *bona fide* resident of the district wherein he proposes to vote for six months immediately preceding the election, and who shall not have been before the passage of this act convicted of any felony," etc. (Cherokee laws, ed. 1881, p. 199.) Clerks, superintendents and supervisors of elections are provided by statute for each precinct, of whom the superintendents pass upon the right to vote (*Id.*, pp. 197–203). It is clear that Gentry's right to vote was denied by the constituted authorities of his own precinct, which should certainly give presumptive evidence that he was a stranger.

All the evidence in the case tends to support the decision of these election officials. He, indeed, claimed to have been born at the other end of the Canadian district near the Creek line, but when next heard from was employed by Fleetwood in the Delaware district at the other end of the nation; thereafter moved to Arkansas, and returned by way of the Choctaw Nation a few months before his death. Any controversy, therefore, civil or criminal, between himself and this plaintiff in error would have been sent to the United States courts for decision under the provisions of Article VII of the Cherokee treaty.

To decide whether Gentry was an Indian at all, it would be necessary first to ascertain the presumption in the absence of evidence.

is not one to be negatived by the indictment or declaration, but one to be set up affirmatively by a plea or answer. Thus it has never been supposed that one should negative in declaration or indictment the possibility of defendant's being a foreign minister or consul (Cf. also 1 Bishop's Criminal Proc., sec. 513). It would be almost impossible to administer justice in the Indian Territory if the District Attorney were obliged to prove affirmatively the American citizenship of the defendant. The Territory is swarming not only with quarter-breeds, but with whites, who have a rightful claim to citizenship; it swarms also with white men, who claim such citizenship without a shadow of foundation. If the *onus* of proving which nation he really belongs to is cast upon the criminal, the courts are far more likely to obtain accurate information on the subject. An example of the claims made before the Indian Territory courts is to be found in the record in *McLish* v. *Roff* (141 U. S., 661), where defendant in error claimed to be a United States citizen for the purpose of getting into the Federal court, and a Chickasaw citizen for the purpose of maintaining the property right which he called upon the Federal court to award him.

It is therefore respectfully submitted that while the question of Gentry's citizenship was properly left to the jury the preponderance of evidence is altogether against such citizenship as would withdraw the case from the jurisdiction of the Federal courts.

EXCEPTIONS.

I.

Plaintiff in error excepts to the instruction that the jury "consider the evidence of Gentry's going out of the Indian country and leaving it in determining whether Gentry was a United States citizen or not, whereas there is no testimony that deceased had ever left the Indian country." The testimony shows that he came to the Cherokee Nation by way of the Choctaw Nation from the State of Arkansas (see testimony of Rice, Scott, and Helterbrand). The court properly charged that temporary absence would not affect Gentry's *status*. It is also charged that his absence might be taken into consideration as tending to show that he had become a citizen of the United States. No exception, however, was taken to this, and we do not, therefore, discuss it.

II.

Plaintiff in error further excepts because the court charged the jury to consider "the fact that his relationship to Cherokee Indians was not made known at the time or for a long time after his death." The court charged, on the contrary, that they should consider "the fact that, if he was connected by the ties of blood with that people, that that was manifested or made known at the time of the killing or since that time" (p. 159). It appears by the evidence that he manifested his relationship by stating it to various persons.

III.

Plaintiff in error further excepts to the action of the court in "summing up all the facts against the position of the defendant, that the deceased was a Cherokee Indian, and in failing to call attention to the facts which show that he was a Cherokee Indian." This, it is respectfully submitted, is not ground for exception. If the plaintiff in error thinks that the court has omitted to charge certain facts, he should make requests to charge accordingly.

IV–VII.

These exceptions are tacitly abandoned in the brief of plaintiff in error (p. 32).

Exception IV is founded on a misquotation (p. 161). Exception V relates to the law of accidental or negligent killing, and is inapplicable to this case, because there is no such defense made. As to Exception VI, we refer to the opinion of the court in the case of *Brown* v. *United States*, decided at this term. Exception VII is too general for consideration. It does not point out what portion of the charge it is intended to apply to.

VIII.

Plaintiff in error further excepts to an alleged charge "that the fact of preparing and carrying a deadly weapon and its use shows premeditation and deliberation." This is a misstatement of the court's charge at page 170.

IX, X.

These exceptions relate to the charge as to the circumstances under which one can take life in self-defense. They appear to us to have become entirely irrelevant by the verdict, which was one of murder. Whether a man is justified in taking life in self-defense, or whether he acted too hastily and inexcusably, are questions relevant to verdicts for manslaughter. The court charged the jury, however, fully on the subject of manslaughter at pages 174–177. Their verdict of murder, therefore, shows conclusively that they did not believe defendant's testimony as to the alleged self-defense; not believing it, they never can have come to the question whether he acted properly as judge, jury, etc.; and it is hard to see how they could possibly have believed it, even had it not been contradicted by so many of the facts in the case. The cases relied upon by the learned court as to this point are to be found in his opinion upon the motion for new trial at pages 194–196 of the record.

If, after the full charge upon manslaughter and verdict of murder, the question be regarded as still material, then the case must be reviewed on authority of *Allen* v. *United States*, decided December 4, 1893.

XI–XIV.

These exceptions are not argued by plaintiff in error (Brief, p. 36). Exception XI refers to the statement at the foot of page 172, to the effect that fabrication of testimony affords foundation for a presumption against the

fabricant. This is well settled. (1 Bishop Crim. Pro., § 1252, and cases cited.) Exceptions XII to XIV are subject to the same comments as exceptions IX and X.

XV.

Plaintiff further excepts to "the comments on the law in reference to flight and the law as given by the court on that subject and in reference to the law on the subject of threats." The comments so objected to cover part of page 159 and parts of pages 179–181. It is respectfully submitted that the exception is too general.

We are not aware of the precise position which the court now takes in capital cases with relation to the generality of exceptions. In *Holder* v. *United States* (150 U. S., ——), decided October 30, 1893, the court, through Mr. Chief-Justice Fuller, say :

> There is no pretense that the charge of the court, occupying twenty-four pages of the printed record, was erroneous in every part and no exception to any particular part is shown. The rule is that a general exception to a charge which does not direct the attention of the court to the particular portions of it, to which objection is made, raises no question for review.

The conviction of murder was therefore affirmed.

In *Hicks* v. *United States*, on the contrary, decided November 27, 1893, and *Allen* v. *United States*, decided December 4, 1893, we understand the court to hold that when but one page of the charge is excepted to, though it may contain many propositions, the appellate tribunal

may look into each of the propositions and reverse the judgment for error in any; the general rules regulating exceptions being relaxed *in favorem vitæ*.

It is said on one side that a man ought not to be hung on account of error of his counsel; on the other side, that if the court's attention is called to its error by a specific exception, the probable result would be a correction of the error, and that any laxer rule would allow criminals to escape retribution through traps laid for the court by their counsel. (Cf. *Carver* v. *Astor*, 4 Pet., 1; *Harvey* v. *Tyler*, 2 Wall., 328, 339, and other cases cited in brief for defendant in error in *Graves* v. *United States*, No. 838 of this term.)

Even, therefore, if we were absolutely clear that errors were contained among the many propositions included in the pages covered by this general exception, we have not yet sufficient information concerning the practice to be followed in these cases to warrant us in confessing error. The learned trial judge regarded himself as charging upon question of fact and giving the jury his own opinion of the case. He did not attempt to coerce their judgment. He does, indeed, make some plain errors of statement, as in referring to the United States as defendant's country at page 179, and commenting on his failure to "seek to have a jury of his country pass upon his case to vindicate him," at page 180. It may be questionable whether an untutored Indian like this prisoner could be expected to know that Judge Parker's court would desist from exercising jurisdiction in his case if it had not lawful jurisdiction, as intimated on page 159, or to appreciate the im-